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No. 04-

IN THE

# Supreme Court of the United States

VERNON EVANS, JR.,
*Petitioner,*

*v.*

STATE OF MARYLAND,
*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND**

## PETITION FOR A WRIT OF CERTIORARI

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## CAPITAL CASE

## QUESTION PRESENTED

Whether the *Ex Post Facto* Clause of the Constitution prohibits sentencing a person to death under a statute that was enacted after the charged offense took place and that lowers the State's burden of proof at sentencing, and increases the defendant's.

## TABLE OF CONTENTS


Page

CAPITAL CASE—QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... v

PETITION FOR A WRIT OF CERTIORARI ..... 1

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

FACTUAL AND PROCEDURAL BACKGROUND ..... 2

REASONS FOR GRANTING THE PETITION ..... 9

EVANS'S SENTENCING UNDER THE NEW DEATH-PENALTY STATUTE VIOLATED THE *EX POST FACTO* CLAUSE, AND THE MARYLAND COURT OF APPEALS' DECISION IS DIRECTLY CONTRARY TO THIS COURT'S DECISION IN *CARMELL* V. *TEXAS* ..... 9

CONCLUSION ..... 17

APPENDIX A: Opinion of the Court of Appeals of Maryland, dated July 23, 2004 and reported at 855 A.2d 291 ..... 1a

APPENDIX B: Order of the Court of Appeals of Maryland denying motion for reconsideration, dated September 10, 2004 ..... 39a

APPENDIX C: Memorandum Opinion and Order of the Circuit Court for Baltimore County, dated July 18, 2003 ..... 41a

**TABLE OF CONTENTS—Continued**

Page

APPENDIX D: Constitutional and Statutory Provisions: U.S. Const. art. I, § 10, cl. 1; Md. Ann. Code art. 27 §§ 412, 413 ..... 47a

APPENDIX E: Maryland Rule 4-345 ..... 55a

APPENDIX F: Excerpts of Transcripts of Resentencing Proceeding ..... 57a

APPENDIX G: Resentencing Jury Findings and Sentence Determination—Victim Scott Piechowicz ..... 109a

APPENDIX H: Resentencing Jury Findings and Sentence Determination—Victim Susan Kennedy ..... 115a

## TABLE OF AUTHORITIES

### CASES

Page(s)

*Apprendi* v. *New Jersey*, 530 U.S. 466 (2000) ..... 3
*Booth-El* v. *Nuth*, 140 F. Supp. 2d 495 (D. Md. 2001) ..... 13, 14
*Booth-El* v. *Nuth*, 288 F.3d 571 (4th Cir. 2002) ..... 13
*Booth* v. *Maryland*, 506 U.S. 988 (1992) ..... 6
*Booth* v. *State*, 608 A.2d 162 (Md. 1992) ..... 4, 7, 12
*Bryant* v. *State*, 824 A.2d 60 (Md. 2003) ..... 2
*Bullington* v. *Missouri*, 451 U.S. 430 (1981) ..... 16
*Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798) ..... 7, 9, 11, 16
*California* v. *Ramos*, 463 U.S. 992 (1983) ..... 17
*Campbell* v. *State*, 601 A.2d 667 (Md. 1992) ..... 7
*Carmell* v. *Texas*, 529 U.S. 513 (2000) ..... *passim*
*Collins* v. *Youngblood*, 497 U.S. 37 (1990) ..... 7, 11, 13, 14
*Colwell* v. *State*, 59 P.3d 463 (Nev. 2002) ..... 17
*Cowell* v. *Leapley*, 458 N.W.2d 514 (S.D. 1990) ..... 17
*Dobbert* v. *Florida*, 432 U.S. 282 (1977) ..... 12, 13
*Evans* v. *Smith*, 54 F. Supp. 2d 503 (D. Md. 1999) ..... 6
*Evans* v. *Smith*, 220 F.3d 306 (4th Cir. 2000), *cert. denied*, 532 U.S. 925 (2001) ..... 6
*Evans* v. *State*, 499 A.2d 1261 (Md. 1985), *cert. denied*, 478 U.S. 1010 (1986) ..... 3
*Evans* v. *State*, 637 A.2d 117 (Md.), *cert. denied*, 513 U.S. 833 (1994) ..... 6
*Evans* v. *State*, 693 A.2d 780 (Md.), *cert. denied*, 522 U.S. 966 (1997) ..... 6
*Fiore* v. *White*, 531 U.S. 225 (2001) ..... 17
*Mills* v. *Maryland*, 486 U.S. 367 (1988) ..... 3
*Moosavi* v. *State*, 736 A.2d 285 (Md. 1999) ..... 7
*Oken* v. *State*, 835 A.2d 1105 (Md. 2003), *cert. denied*, 124 S. Ct. 2084 (2004) ..... 3
*Preston* v. *State*, , 470 A.2d 395 (Md. Ct. Spec. App. 1984) ..... 7
*Ring* v. *Arizona*, 536 U.S. 584 (2002) ..... 3, 16
*State* v. *Guzek*, 86 P.3d 1106 (Or. 2004) ..... 16

## TABLE OF AUTHORITIES—Continued

Page(s)

*State* v. *Whitfield*, 107 S.W.3d 253 (Mo. 2003) ..... 17
*Strickland* v. *Washington*, 466 U.S. 668 (1984) ..... 16
*Teague* v. *Lane*, 489 U.S. 288 (1989) ..... 17
*United States* v. *Safarini*, 257 F. Supp. 2d 191 (D.D.C. 2003) ..... 16

### CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. I, § 10, cl. 1 ..... 2
28 U.S.C. § 1257(a) ..... 1
28 U.S.C. § 2106 ..... 17
28 U.S.C. § 2244 ..... 2
Md. Ann. Code art. 27
§ 413 ..... 2
§ 413(e)(1) ..... 5, 8
§ 413(g)(4) ..... 4
§ 413(g)(8) ..... 4, 5
§ 413(h) ..... 3

### RULES

Supreme Court Rule 16 ..... 18
Maryland Rule 4-345 ..... 7, 8

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND**

## PETITION FOR A WRIT OF CERTIORARI

Petitioner Vernon Evans, Jr., who is currently confined under a sentence of death imposed by the State of Maryland, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals of Maryland (App. 1a-38a) is published at 855 A.2d 291 (Md. 2004). The memorandum opinion and order of the Circuit Court for Baltimore County denying relief (App. 41a-46a) is unreported.

## JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on July 23, 2004. Evans timely filed a motion for reconsideration on August 20, 2004, which the Court of Appeals denied on September 10, 2004. App. 39a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the *Ex Post Facto* Clause of the United States Constitution, U.S. Const. art. I, § 10, cl. 1, and Maryland Annotated Code art. 27, § 413,[1] both of which are set forth at App. 47a-53a.

## STATEMENT OF THE CASE

Petitioner Vernon Evans, Jr. was sentenced to death under the wrong death-penalty statute. He was sentenced to death under a statute that was enacted after the offense he was charged with, and the new statute unambiguously lowered the State's burden of proof at sentencing. This retroactive application of a statute that unequivocally favored the State and made it easier for the State to meet its burden of proof at sentencing violates the *Ex Post Facto* Clause of the United States Constitution and is directly prohibited by this Court's decision in *Carmell* v. *Texas*, 529 U.S. 513 (2000). Maryland, in short, has failed to "abide by the rules of law it establishe[d] to govern the circumstances under which it can deprive a person of his or her liberty or life." *Id.* at 533. The State may soon seek to impose the illegal sentence it obtained under the wrong statute and deprive Evans of his life. This Court should grant a writ of certiorari to permit a resentencing under the proper statute.[2] Given the clear error involved, the Court also may wish to reverse summarily after granting the writ.

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[1] In 2002, Maryland's statutory provisions governing homicide were recodified without substantive change in a new Criminal Law Article, and Article 27, § 413 was recodified as Criminal Law Article, §§ 2-202, 2-303, 2-304, 2-305. *See Bryant* v. *State*, 824 A.2d 60, 66 n.5 (Md. 2003). This petition cites to the pre-2002 codification.

[2] If this Court does not grant certiorari, Evans's claim might not receive any further review because Evans has already litigated one application for a writ of habeas corpus. *See* 28 U.S.C. § 2244.

## FACTUAL AND PROCEDURAL BACKGROUND

On April 28, 1983, Scott Piechowicz and Susan Kennedy were murdered in Pikesville, Maryland. The State indicted petitioner Evans on two counts of first-degree murder and sought the death penalty, alleging that Evans was the shooter (which Evans vigorously denies, *see infra* n.5). In 1984, Evans was convicted on both counts and sentenced to death. *See Evans* v. *State*, 499 A.2d 1261 (Md. 1985), *cert. denied*, 478 U.S. 1010 (1986). In 1991, Evans was granted a new sentencing because the sentencing form used at his trial was identical to the form held unconstitutional in *Mills* v. *Maryland*, 486 U.S. 367 (1988).

At Evans's resentencing in November 1992, the Circuit Court for Baltimore County used the wrong statute. In order to obtain a death sentence under Maryland's capital punishment scheme, the State must prove, by a preponderance of the evidence and by a unanimous jury vote, that the aggravating circumstances equal or outweigh any mitigating circumstances that the defendant establishes by a preponderance of the evidence. *See* Md. Ann. Code art. 27, § 413(h).[3] When Evans's charged offense occurred in April 1983, section 413(g)(4) of the Maryland death-penalty statute specifically identified intoxication as one of the statutorily

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[3] Under Maryland's statute, the State must prove the existence of aggravating circumstances beyond a reasonable doubt, but the burden of proving that aggravating circumstances equal or outweigh mitigating circumstances is only by a preponderance of the evidence. In *Ring* v. *Arizona*, 536 U.S. 584 (2002), and *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held that a defendant is entitled to a jury determination, beyond a reasonable doubt, of "any fact on which the legislature conditions an increase in [the] maximum punishment." *Ring*, 536 U.S. at 589. In *Oken* v. *State*, 835 A.2d 1105 (Md. 2003), *cert. denied*, 124 S. Ct. 2084 (2004), the Maryland Court of Appeals ruled that Maryland's statute was consistent with the requirements of *Ring* and *Apprendi* on the rationale that the weighing of aggravating and mitigating circumstances is not "factfinding" and, therefore, is not subject to the requirement of a jury determination beyond a reasonable doubt, even if the finding results in an increase in the maximum punishment. *Id.* at 1152-1157. This Court has not considered, on the merits, the correctness of that analysis.

enumerated mitigating circumstances. Section 413(g)(4) then provided: "The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental incapacity, mental disorder, emotional disturbance, *or intoxication.*" App. 51a-52a (emphasis added). If the jury found that one of those circumstances existed, the jury automatically had to treat that circumstance as mitigating. Accordingly, for the jury to consider intoxication as a mitigating circumstance, a defendant needed to show, by a preponderance of the evidence, only that his capacity had been diminished by intoxication.

Effective July 1, 1983, however, the words "or intoxication" were removed from section 413(g)(4). App. 52a Under the amended statute, a jury could consider a defendant's intoxication only under the statute's catchall provision for mitigating circumstances, Md. Ann. Code art. 27, § 413(g)(8) (App. 52a). *See Booth* v. *State*, 608 A.2d 162, 174-175 (Md. 1992). Under that provision, for the jury to consider intoxication as a mitigating circumstance, the defendant had to show, by a preponderance of evidence, not only that his capacity was diminished by intoxication, but also that this fact mitigated, rather than aggravated (or was merely neutral on), his culpability.

This change raised the burden for defendants to establish intoxication as a mitigating circumstance, and it correspondingly lowered the State's burden of proving that the aggravating circumstances equaled or outweighed the mitigating circumstances. The State could now argue to jurors, and in this case did, that they need not even consider a defendant's intoxication and that, if they did, they should consider it as an additional aggravating circumstance. This change obviously always favors the State—never a defendant.

At the 1992 resentencing, Evans's primary defense was a mitigation defense—that he was sorry for any role he played in the crime and that, on the day of the crime, he was

under the influence of narcotics and therefore intoxicated.[4] Evans's counsel presented testimony that Evans and his girlfriend used heroin the night before the murders and that both were feeling the effects of the drugs on the day of the murders (App. 64a, 73a-75a); that Evans frequently was not "rational" because of his drug use (App. 84a); and that when Evans arrived at the Maryland State Penitentiary he was "in the throes of ... addiction" and "still craving drugs" (App. 88a, 91a).

Even though Evans's counsel presented this evidence of intoxication, and even though Evans's charged offense occurred on April 28, 1983, the resentencing court applied the new, *post*-July 1, 1983 death-penalty statute, which eliminated intoxication as an automatic mitigating factor and allowed a jury to consider a defendant's intoxication only under the statute's catchall mitigation provision, Md. Ann. Code art. 27, § 413(g)(8) (App. 52a). The State, in fact, seized on this new burden of proof and argued to jurors that Evans's intoxication did not in any way mitigate his culpability, but only served to aggravate it. Specifically, the prosecutor during closing arguments to the jury referred to Evans's intoxication and said: "Does that mitigate what he has done at all? No. It makes it worse." App. 107a.

During its deliberations, the jury found that two aggravating circumstances existed (App. 110a, 116a), and the jury therefore was required to consider any mitigating circumstances before imposing a death sentence. Each juror was required to determine whether any mitigating circumstance that he or she found to exist outweighed the aggravating circumstances. App. 113a, 119a.

Despite the prosecutor's argument that intoxication aggravated rather than mitigated culpability, Evans per-

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[4] Evans's counsel at resentencing failed to present evidence that Evans was not the shooter (and thus not death-eligible as a "principal in the first degree," *see* Md. Ann. Code art. 27, § 413(e)(1) (App. 50a)) because they failed to interview the only eyewitness to the shooting, who later testified under oath that Evans was not the shooter, *see infra* n.5.

suaded at least one juror (but fewer than all 12) that his use of drugs mitigated culpability. App. 113a, 119a (stating that "[o]ne or more [of the jury members], but fewer than all 12, find by a preponderance of the evidence that the following additional mitigating circumstances exist: Drug influence and Deterioration"). Without the Legislature's judgment specifying that intoxication was considered a mitigating circumstance, however, none of the jurors found that the mitigating circumstances outweighed the aggravating circumstances, and the jury sentenced Evans to death. Since the determination that mitigating circumstances did not outweigh aggravating circumstances had to be unanimous, if just one juror had concluded that intoxication was a mitigating circumstance and that, either alone or together with other mitigating circumstances, it outweighed the aggravating circumstances, Evans could have been sentenced only to life imprisonment. App. 52a.

On appeal, a divided Maryland Court of Appeals affirmed the death sentences. *Evans* v. *State*, 637 A.2d 117 (Md.), *cert. denied*, 513 U.S. 833 (1994). Evans subsequently sought state post-conviction relief, which the circuit court denied. A divided Maryland Court of Appeals denied Evans's application for review of that ruling. *Evans* v. *State*, 693 A.2d 780 (Md.), *cert. denied*, 522 U.S. 966 (1997). Evans also sought federal habeas relief, which the district court denied, *Evans* v. *Smith*, 54 F. Supp. 2d 503 (D. Md. 1999), and the United States Court of Appeals for the Fourth Circuit affirmed, *Evans* v. *Smith*, 220 F.3d 306 (4th Cir. 2000), *cert. denied*, 532 U.S. 925 (2001).

During the resentencing, appeal, and post-conviction litigation, Evans did not assert an *ex post facto* claim based on the trial court's use of the post-July 1, 1983 statute. At the time of the resentencing, the Maryland Court of Appeals had specifically foreclosed such a claim, *see Booth*, 608 A.2d at 174-179, and this Court shortly thereafter denied certiorari, 506 U.S. 988 (1992). The Maryland high court in *Booth* had relied on certain language in this Court's decision in *Collins* v. *Youngblood*, 497 U.S. 37 (1990). As this Court

later recognized in *Carmell*, 529 U.S. at 537-539, the *Collins* decision arguably appeared to depart from *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798), which had identified four discrete categories of laws implicating the *ex post facto* prohibition. In recapitulating the types of *ex post facto* laws, *Collins* had not specified the fourth category—relating to changes in burdens of proof. *Collins*, 497 U.S. at 42. In *Booth*, therefore, the Maryland court treated the traditional fourth category—under which Evans could have made a claim based on the post-July 1, 1983 statute—as having been eliminated from those that are constitutionally proscribed. *Booth*, 608 A.2d at 175.

In its 2000 *Carmell* decision, however, this Court explicitly clarified that there are indeed *four*, not three, categories of *ex post facto* laws—the fourth of which applies to laws that effect changes in burdens of proof that favor the State, such as the post-July 1, 1983 Maryland death-penalty statute. *Carmell*, 529 U.S. at 538-539, 541. In the wake of *Carmell*, on October 5, 2001, Evans filed a motion to correct illegal sentence under Maryland Rule 4-345 (App. 55a), raising for the first time the argument that the use of the new, post-July 1, 1983 death-penalty statute at his sentencing violated the *Ex Post Facto* Clause because it lowered the State's burden of proof.

Evans's motion was procedurally proper because Maryland Rule 4-345 expressly gives courts the broad power to correct an illegal sentence "at any time," even if not raised at trial or on direct appeal. App. 55a ; *see also Preston* v. *State*, 470 A.2d 395, 398 (Md. Ct. Spec. App. 1984); *cf. Moosavi* v. *State*, 736 A.2d 285, 291 (Md. 1999); *Campbell* v. *State*, 601 A.2d 667, 677 (Md. 1992). On July 18, 2003, the Circuit Court for Baltimore County denied Evans's motion to correct illegal sentence. The court held that Evans's sentence was not "illegal" because the sentence was "within the statutory authority of the court to impose." App. 46a.

On appeal, the Maryland Court of Appeals held that Evans's motion was procedurally proper under Maryland Rule 4-345 (App. 31a-32a), but affirmed the circuit court's

denial of Evans's motion on the merits (App. 38a). The court acknowledged that "[i]nstead of the Legislature indicating its judgment that intoxication should be deemed mitigating, [the new statute] provided that each juror should make that judgment." *Id.* But even though that change unequivocally made it harder for a defendant to establish intoxication as a mitigating circumstance and easier for the State to meet its burden of proving that the aggravating circumstances equaled or outweighed the mitigating circumstances, the court nonetheless held that there was "no significant change" in the law. *Id.* The court said that because under the old, pre-July 1, 1983 statute a juror was free to give a mitigating circumstance whatever weight he or she wanted, the removal of the Legislature's instruction to consider intoxication to be a mitigating circumstance "changed nothing." App. 37a.[5]

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[5] The court of appeals also rejected a separate argument by Evans for a new trial based on newly discovered evidence. App. 8a-24a. This evidence, in conjunction with other evidence never considered by the sentencing jury, squarely pointed to a person other than Evans as the shooter. If he was not the shooter, Evans is not eligible for the death penalty under Maryland law. *See* Md. Ann. Code art. 27, § 413(e)(1) (App. 50a).

In his motion for a new trial, Evans presented FBI investigative reports for 11 witnesses that the State never turned over to him until 2002. These new reports substantially undermined the State's evidence that Evans was the shooter (and therefore eligible for the death penalty). Evans presented these new reports in conjunction with the testimony of three other witnesses that establish that Evans could not have been the shooter. In particular, Evans presented the testimony of the *only* eyewitness to the crime, Roberta Weinstein, a store proprietor who saw the shooting from approximately 10 yards away and who testified at a post-conviction hearing under oath that the shooter was her height, about 5'7" or 5'8", what she called "average size." Maryland Court of Appeals Record Extract at 153 (E__). Evans, however, is very short—only 5'2"—and is nicknamed "Shorty." *See* E054-E055. Indeed, Weinstein testified—while viewing Evans directly in the courtroom—that the shooter "was a lot taller" than Evans, and that that the shooter was wearing a light tan shirt or windbreaker and dark trousers, not the suit that the State's star witness testified that Evans was wearing. E154. No jury

## REASONS FOR GRANTING THE PETITION

### EVANS'S SENTENCING UNDER THE NEW DEATH-PENALTY STATUTE VIOLATED THE *EX POST FACTO* CLAUSE, AND THE MARYLAND COURT OF APPEALS' DECISION IS DIRECTLY CONTRARY TO THIS COURT'S DECISION IN *CARMELL* V. *TEXAS*.

Maryland's sentencing of Evans under the new, post-July 1, 1983 death-penalty statute—rather than under the death-penalty statute that was in effect when the charged offenses occurred on April 28, 1983—violated the *Ex Post Facto* Clause because it changed the burden of proof in a manner that unequivocally, and always, favored the State. As this Court explained in *Carmell* v. *Texas*, 529 U.S. 513 (2000), the fourth category of *ex post facto* laws enumerated in *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798), protects against the government "refus[ing], after the fact, to play by its own rules, altering them in a way that is advantageous only to the State." *Carmell*, 529 U.S. at 533. Such protection is necessary because "[t]here is plainly a fundamental fairness interest . . . in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or *life*." *Id.* (emphasis added). Notwithstanding the clarity of this Court's instruction in *Carmell*, the Maryland Court of Appeals chose to try to defend its prior decision in *Booth* v. *State*, 608 A.2d 162 (Md. 1992)—which had held, erroneously, that there were only *three* categories of *ex post facto* laws—and argued that the application of the new death-penalty statute at Evans's sentencing law was constitutional because change was not "significant." App. 38a.

That holding was wrong as a matter of fact, because the change substantially harms defendants, and as a matter of law, because in any event the legal analysis mandated by this Court in *Carmell* does not depend on the degree of harm to defendants—only on whether the change altered the

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ever heard this testimony because, as Evans's resentencing counsel later testified, they "lost track" of Weinstein.

burden of proof in a manner that uniformly advantages the State. The change in the law here did just that, and this Court should grant the petition to correct the Maryland high court's error. Indeed, because the application of the post-July 1, 1983 death-penalty statute at Evans's sentencing so clearly falls within the fourth category of prohibited *ex post facto* laws, the Court may wish to consider summary reversal.

This Court reaffirmed in *Carmell* that the *Ex Post Facto* Clause prohibits the four types of criminal laws that Justice Chase enumerated in his opinion in *Calder*. Those categories (the fourth of which is most relevant here) are:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. **4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender*.**

*Carmell*, 529 U.S. at 522 (quoting *Calder*, 3 U.S. (3 Dall.) at 390 (Chase, J.)) (bold emphasis added). "All these, and similar laws," said Justice Chase, "are manifestly *unjust and oppressive*." *Calder*, 3 U.S. (3 Dall.) at 391 (emphasis added).

In *Carmell*, this Court provided a detailed explanation of the fourth category of *ex post facto* laws. The Court held that the fourth category broadly encompasses changes that lower the State's burden of proof, reduce the amount of evidence the State is required to present, or otherwise "subvert[] the presumption of innocence . . . by making it easier [for the State] to meet the threshold for overcoming the presumption." 529 U.S. at 532; *see also id.* at 541 ("[T]here is no good reason to draw a line between laws that lower the burden of proof and laws that reduce the quantum of evidence

necessary to meet that burden; the two types of laws are indistinguishable in all meaningful ways relevant to concerns of the *Ex Post Facto* Clause."); *cf. id.* at 572 (Ginsburg, J., dissenting) ("Laws that reduce the burden of persuasion the prosecution must satisfy to win" or that "retroactively increas[e] the defendant's burden of persuasion as to an affirmative defense" would fit within fourth *Calder* category). The Court explained that the government cannot "refuse[], after the fact, to play by its own rules, altering them in a way that is advantageous only to the State." *Id.* at 533.

Purporting to apply *Carmell*, the Maryland Court of Appeals, on the basis of the most cursory reasoning, concluded in the present case that the application of the post-July 1, 1983 death-penalty statute to Evans did not constitute an *ex post facto* violation. The court conceded, as it had to, that the new statute had effected some change: "[i]nstead of the Legislature indicating its judgment that intoxication should be deemed mitigating, [the post-July 1, 1983 statute] provided that each juror should make that judgment." App. 38a. The court, however, argued that the difference between a jury considering intoxication automatically as a mitigating circumstance under section 413(g)(4) and considering it only under the statutory catchall, section 413(g)(8), was "relatively small" (App. 28a) and that the new statute therefore effected "no significant change" (App. 38a).

The Court of Appeals' decision bears no relationship to the analysis of the *Ex Post Facto* Clause required by *Calder* and *Carmell*. As an initial matter, since "[s]ubtle *ex post facto* violations are no more permissible than overt ones," *Collins*, 497 U.S. at 46, any law falling into the four categories articulated in *Calder* cannot be applied retroactively, no matter how small the effect. *See Carmell*, 529 U.S. at 532-533, 539. Therefore, the Court of Appeals' view (which, in any event was incorrect, *see infra*) that the change effected by the post-July 1, 1983 was "relatively small" (App. 28a) and not "significant" (App. 38a) is beside the point.

The crucial legal question is whether the change in Maryland's statute falls within the fourth *Calder* category by raising the burden for defendants and/or lowering it for the State. The answer to that question is clearly "yes." Under the death-penalty statute in effect at the time of Evans's charged offenses, in order for the jury to consider intoxication as a mitigating circumstance, a defendant was required to prove one element—the existence of intoxication. After the change, a defendant bore the burden of proving two elements: (1) the existence of intoxication, and (2) that the intoxication mitigated, rather than aggravated (or was neutral on), his culpability. *See Booth*, 608 A.2d at 175. The resentencing court made this burden clear in its instructions to the jury:

> Your determination as to the existence of any such [non-statutory] mitigating factor must include a finding that the circumstance exists in this case *and that the circumstance is, in fact, mitigating.*

App. 102a (emphasis added).

This change in the law not only increased the burden on the defendant but also lowered the burden on the State. Faced with an argument that a defendant's culpability was mitigated by intoxication, the State was required, before the new statute, to demonstrate to the jury that the aggravating circumstances equaled or outweighed this mitigating circumstance. After the change, however, the State could potentially overcome this defense simply by denying that intoxication mitigated culpability or arguing (as the State did here) that intoxication was an aggravating circumstance.

The statutory change, in short, expressly placed a new burden on the defendant, lowered the burden on the State, and, in effect, "[r]educ[ed] the quantum of evidence" that the State was required to present in order to obtain a sentence of death. *Carmell*, 529 U.S. at 532. And unlike cases such as *Collins* and *Dobbert* v. *Florida*, 432 U.S. 282 (1977)—where the statutory changes undisputedly did not fall within any of the *Calder* categories and where although a certain defendant may have been harmed by the changes other defen-

dants would benefit from them—the change here directly lessened the State's burden at trial and did so in a manner that always and unequivocally favors the State.[6] Such a change falls squarely within the fourth category of prohibited *ex post facto* laws described in *Carmell*. *See Carmell*, 529 U.S. at 533 & n.23 (contrasting unconstitutional changes that are "advantageous only to the State" with constitutionally permissible changes that are "evenhanded, in the sense that they may benefit either the State or the defendant in any given case"); *id.* at 546 (rules lowering the State's evidentiary threshold "will *always* run in the prosecution's favor" whereas procedural changes (such as changes to witness competency rules) "do not necessarily run in the State's favor" or "affect, let alone subvert, the presumption of innocence").[7]

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[6] *Collins*, 497 U.S. at 39-40, 52 (no *ex post facto* violation where new statute permitted appellate court to correct verdict to eliminate unauthorized punishment, often to benefit of defendant); *Dobbert*, 432 U.S. at 294-295 (no *ex post facto* violation where new statute permitted judge to increase or decrease jury's advisory sentence; such a change was, on balance, "ameliorative"). The Maryland court's suggestion that the statutory changes in *Collins* and *Dobbert* had "consequences far more disadvantageous" to the defendants in those cases than the Maryland's new death-penalty statute (App. 34a-35a) is thus not only speculative but also irrelevant.

[7] In 2001, the United States District Court for the District of Maryland adopted the argument presented here, recognizing that *Carmell* meant that Maryland's application of the post-July 1, 1983 statute to pre-July 1, 1983 offenses was unconstitutional. *Booth-El* v. *Nuth*, 140 F. Supp. 2d 495 (D. Md. 2001). In a thorough and well-reasoned opinion by Judge Blake, the court granted a writ of habeas corpus to the defendant in *Booth* because the change in Maryland's statute "effectively lowered the prosecution's burden of proof by increasing the burden placed on the defendant" and therefore fell within the fourth *Calder* category of *ex post facto* laws. *Id.* at 514.

The Fourth Circuit reversed on appeal, relying on the deference that federal courts must show to state courts on federal habeas review. *Booth-El* v. *Nuth*, 288 F.3d 571 (4th Cir. 2002). The Fourth Circuit held that at the time of the Maryland Court of Appeals' decision in *Booth* in 1990, the fourth category of *ex post facto* laws was not "clearly established" because of the ambiguity on that point in this Court's opinion in *Collins*. *Id.* at

The Maryland Court of Appeals said that the new law "changed nothing with regard to the existence of or weight to be given a mitigating circumstance" (App. 37a), but the court was fundamentally wrong. The use of the post-July 1, 1983 death-penalty statute affected both whether intoxication would be found to exist as a mitigating circumstance by jurors and what weight jurors would assign to it during the balancing stage. Instead of being an automatic mitigating circumstance for any defendant who could present facts showing the influence of intoxicating substances, the *existence* of intoxication as a mitigating circumstance in that situation became a debatable issue. And by removing the Legislature's clear instruction to jurors—reflecting a considered legislative judgment—that intoxication was to be considered a mitigating circumstance,[8] the new statute inevitably lessened the *weight* that jurors would give it.

Although one cannot, in retrospect, determine precisely whether and how this change affected juror deliberations here, the probable impact of this statutory change can be seen clearly in the circumstances of this case. Evans's counsel put drug influence at the very heart of Evans's defense at his 1992 resentencing. Witnesses testified that Evans and

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577-578. This case, of course, does not arise on federal habeas review, and the issue is not whether the Maryland Court of Appeals was correct in 1990 in *Booth* but whether it was correct in 2004 in this case.

The Fourth Circuit also reasoned that the statutory change was purely "procedural," and therefore did not run afoul of the *Ex Post Facto* Clause. 288 F.3d at 578-580. That argument, however, is based on an old line of case law that this Court has flatly rejected. As this Court explained in *Carmell*, it no longer "define[s] the scope of the [*Ex Post Facto*] Clause along an axis distinguishing between laws involving 'substantial protections' and those that are merely 'procedural.'" 529 U.S. at 539; *see also Collins*, 497 U.S. at 46. Instead, "the prohibition which may not be evaded is the one defined by the *Calder* categories." *Carmell*, 529 U.S. at 539.

[8] The "Preamble" to the new post-July 1, 1983 statute specifically explains that the purpose of removing intoxication as an automatic mitigating factor was to reduce the "emphasis" given to intoxication as a mitigating factor by "not highlight[ing it] specifically." App. 29a.

his girlfriend used heroin the night before the murders and that both were feeling the effects of the drugs on the day of the murders (App. 64a, 73a-75a); that Evans frequently was not "rational" because of his drug use (App. 84a); and that, when Evans arrived at the Maryland State Penitentiary, he was "in the throes of . . . addiction" and "still craving drugs" (App. 88a, 91a). In light of this evidence, Evans's counsel expressly argued to the jury that "[a]nyone that knows anything about drugs knows that drugs do things to people and it has them do things that they shouldn't do or wouldn't do . . . ." App. 58a. Indeed, Evans himself stated in his allocution that he "lost everything that constituted a human being once drugs had control of [him]." App. 93a.

The State, however, expressly tried to take advantage of the change worked by the new statute, arguing that Evans's intoxication was not a mitigating factor at all. Referring to Evans's intoxication, the prosecutor during closing arguments asked the jury, "Does that mitigate what he has done at all? No. It makes it worse." App. 107a. By increasing the burden on Evans, the new law made it far easier for the State to persuade jurors that Evans's intoxication was not a mitigating factor and that, even if it was, it should be given a low weight during the balancing stage of the sentencing process.

Despite the State's argument, the jury's verdict form reveals that at least one juror (and possibly more) concluded that, even under the new, more stringent death-penalty statute, drug influence mitigated Evans's culpability. App. 113a, 119a. Had the jurors been instructed by the circuit court that intoxication was a mitigating factor as a matter of law—as required by the pre-July 1, 1983 statute—that juror (or those jurors), or perhaps one or more of the other jurors, might have concluded that the influence of drugs on Evans's behavior was sufficient to outweigh the aggravating circumstances of the crime. If just one juror had reached that conclusion, Evans's life would have been spared.

Finally, although it is unclear what role, if any, the suggestion played in the decision below, the Maryland Court of

Appeals also suggested that the fourth *Calder* category of *ex post facto* laws does not apply to the post-July 1, 1983 statute because the statute relates to sentencing, not conviction. App. 37a. That assertion does not withstand scrutiny, however, and is in clear conflict with other case law. As this Court made clear in *Calder*, laws falling into the four enumerated categories and all "similar laws" are prohibited by the *Ex Post Facto* Clause. *Calder*, 3 U.S. (3 Dall.) at 391. Thus, even the dissent in *Carmell* (which argued for a narrower interpretation of the *Ex Post Facto* Clause) stated that the fourth category reaches sentencing statutes, such as the one at issue here:

> Imagine, for example, a statute requiring the prosecution to prove a particular sentencing enhancement factor—leadership role in the offense, say, or obstruction of justice—beyond a reasonable doubt. A new statute providing that the factor could be established by a mere preponderance of the evidence might rank as *ex post facto* if applied to offenses committed before its enactment. The same might be said of a statute retroactively increasing the defendant's burden of persuasion as to an affirmative defense.

*Carmell*, 529 U.S. at 572 (Ginsburg, J., dissenting). This Court has generally extended constitutional procedural protections to the penalty phase of capital trials, *see Ring* v. *Arizona*, 536 U.S. 584, 606 (2002); *Strickland* v. *Washington*, 466 U.S. 668, 686-687 (1984); *Bullington* v. *Missouri*, 451 U.S. 430, 446 (1981), and any other approach here would conflict with the decisions of other courts, *see, e.g.*, *United States* v. *Safarini*, 257 F. Supp. 2d 191, 201 (D.D.C. 2003) (application of a new death-penalty statute, which "allow[ed] the consideration of additional aggravating factors" and changed the procedure for considering aggravating and mitigating factors during the sentencing procedure "would violate the fourth *Calder* prohibition" by altering rules of evidence and altering the "'amount or measure' of proof necessary to impose the death penalty"); *State* v. *Guzek*, 86 P.3d

1106, 1113 (Or. 2004) ("[W]hen a change in the law alters the rules of evidence in a one-sided way that makes a sentence of death more likely than it would have been at the time that a defendant committed aggravated murder, application of that law to the defendant offends the *ex post facto* prohibition . . . .").[9]

## CONCLUSION

This Court should grant Evans's petition and issue a writ of certiorari to the Maryland Court of Appeals. Evans's claim is governed by this Court's decision in *Carmell*; the reasoning of the Maryland Court of Appeals directly contradicts that decision; and Evans is entitled to a new sentencing under the correct statute. Because Evans's claim requires this Court to engage only in a straightforward application of its precedent, Evans respectfully suggests that the Court may wish to consider summary reversal. *See* 28 U.S.C. § 2106 ("The Supreme Court . . . may affirm, modify, vacate,

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[9] The State argued below that the fourth *Calder* category did not apply to Evans's case because this Court has not made *Carmell* retroactively applicable under *Teague* v. *Lane*, 489 U.S. 288 (1989). *Teague*, however, restricts only the application of new constitutional rules; Evans's claim is based on ancient principles specified 200 years ago in *Calder* and that *Carmell* merely re-affirmed. *See Carmell*, 529 U.S. at 525, 537-539; *cf. Fiore* v. *White*, 531 U.S. 225, 228 (2001). Moreover, *Teague* limits only federal collateral review of final state decisions that may not be reopened in state courts. The States are free to apply constitutional protections more broadly than *Teague* would permit. *See State* v. *Whitfield*, 107 S.W.3d 253, 266-268 (Mo. 2003); *Colwell* v. *State*, 59 P.3d 463, 470-471 (Nev. 2002); *Cowell* v. *Leapley*, 458 N.W.2d 514, 517-518 (S.D. 1990); *cf. California* v. *Ramos*, 463 U.S. 992, 1013-1014 (1983) ("It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."). Since the Maryland Court of Appeals rejected the State's *Teague* argument and decided Evans's claim on the merits, there is no obstacle to this Court's direct review of that decision.

The State also argued below that the fourth *Calder* category did not apply because the new Maryland statute was merely a "procedural" change analogous to those found lawful in *Collins* and *Dobbert*, but as explained *supra* pp. 12-13 & nn.6-7, those cases are readily distinguishable.

set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."); S. Ct. R. 16.

Respectfully submitted,

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DECEMBER 2004

# APPENDICES

**APPENDIX A**

COURT OF APPEALS OF MARYLAND

VERNON EVANS, JR.

*v.*

STATE OF MARYLAND

No. 78

Sept. Term 2003

July 23, 2004
Reconsideration Denied Sept. 10, 2004

[855 A.2d 291]

ELDRIDGE, Judge.

The appellant, Vernon Evans, Jr., admittedly participated in the contract murders of David Scott Piechowicz and Susan Kennedy on April 28, 1983, in the Warren House Motel located in Baltimore County, Maryland. Evans was convicted of first degree murder of both victims, and he is presently under sentences of death. This Court has, on eight prior occasions, rejected Evans's challenges to his prosecution, convictions, and sentences.[1]

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[1] *See Evans v. State*, 345 Md. 524, 693 A.2d 780, *cert. denied*, 522 U.S. 966, 118 S.Ct. 411, 139 L.Ed.2d 314 (1997); *Evans v. State*, 333 Md. 660, 637 A.2d 117, *cert. denied*, 513 U.S. 833, 115 S.Ct. 109, 130 L.Ed.2d 56 (1994); *Foster, Evans and Huffington v. State*, 305 Md. 306, 503 A.2d 1326, *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3310, 92 L.Ed.2d 722 (1986); *Evans v. State*, 304 Md. 487, 499 A.2d 1261 (1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3310, 92 L.Ed.2d 722 (1986); *Evans v. State*, 301 Md. 45, 481 A.2d 1135 (1984), *cert. denied*, 470 U.S. 1034, 105 S.Ct. 1411, 84 L.Ed.2d 795 (1985). In addition, the Court denied, in unreported orders, applications by Evans for leave to appeal on December 14, 2001, December 16, 1999, and June 4, 1991.

In the present case, the ninth time he has been before this Court, Evans argues that he is entitled to a new sentencing hearing on either of two grounds. *First*, he contends that allegedly newly discovered evidence would show "that he was not the shooter and therefore not eligible for the death penalty." (Appellant's brief at 11). *Second*, Evans argues that the trial judge's application, at his sentencing hearing, of an amendment to the Maryland death penalty statute regarding mitigating circumstances, which amendment became effective a few months after the murders, **[*293]** violated the *ex post facto* clauses of the United States and Maryland constitutions.[2] We shall reject both of Evans's arguments.

## I.

Some basic facts underlying the prosecution were summarized by this Court in *Evans v. State*, 304 Md. 487, 494-496, 499 A.2d 1261, 1264-1265 (1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3310, 92 L.Ed.2d 722 (1986), as follows:

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*See also Evans v. Smith*, 220 F.3d 306 (4th Cir.2000), *affirming Evans v. Smith*, 54 F.Supp.2d 503 (D.Md.1999), *cert. denied*, 532 U.S. 925, 121 S.Ct. 1367, 149 L.Ed.2d 294 (2001).

[2] Article I, § 10, cl. 1 of the Constitution of the United States provides as follows:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Article 17 of the Maryland Declaration of Rights provides as follows:

> **Article 17. Ex post facto laws; retrospective oaths or restrictions.**
>
> That retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore, no *ex post facto* Law ought to be made; nor any retrospective oath or restriction be imposed, or required.

According to the State's evidence, the defendant Evans and Anthony Grandison entered into an agreement whereby Evans would kill David Scott Piechowicz and his wife, Cheryl, because the couple were scheduled to testify against Grandison in a narcotics case pending in the United States District Court for the District of Maryland. Evans was to receive $9,000.00 from Grandison for performing the murders.

David Scott Piechowicz and Cheryl Piechowicz were employed at the Warren House Motel in Baltimore County. On April 28, 1983, Susan Kennedy, the sister of Cheryl Piechowicz, was working in place of Cheryl at the Warren House Motel. The evidence was sufficient to prove beyond a reasonable doubt that, on April 28th, Evans went to the motel and, not knowing the Piechowiczs, shot David Scott Piechowicz and Susan Kennedy with a MAC-11 machine pistol. Nineteen bullets were fired at the victims, who died from the multiple gunshot wounds.

A two count indictment was filed against Evans and Grandison in the United States District Court. They were charged with violating the Piechowiczs' civil rights by interfering with their right to be witnesses in a judicial proceeding, in violation of 18 U.S.C. § 241, and with witness tampering, in violation of 18 U.S.C. § 1512.

Subsequently the present case began with a four count indictment in the Circuit Court for Baltimore County, charging Evans and Grandison each with two counts of first degree murder, one count of conspiracy to commit murder, and use of a handgun in the commission of a felony or crime of violence. Upon the defendants' requests for removal, Grandison's trial was transferred to the Circuit Court for Somerset County and Evans's trial was transferred to the Circuit Court for Worcester County.

Prior to the trial in the instant case, Evans was convicted on the federal charges and sentenced to life plus ten years imprisonment. He then filed a pretrial motion to dismiss the charges in this case on double jeopardy grounds. The motion was denied by the trial judge, and this Court affirmed. *Evans v. State*, 301 Md. 45, 481 A.2d 1135 (1984), *cert. denied*, 470 U.S. 1034, 105 S.Ct. 1411, 84 L.Ed.2d 795 (1985).

**[*294]** Thereafter the trial in the present case proceeded. Among the witnesses offering significant incriminating evidence against the defendant Evans were Janet Moore, Charlene Sparrow and Calvin Harper. Moore, Grandison's girlfriend, had been contacted by Grandison, who was then in the Baltimore City Jail, to assist in making arrangements for the murder of the witnesses. Sparrow was Evans's girlfriend and offered the most damaging testimony about the defendant's involvement as the killer. According to Sparrow, she had accompanied the defendant and Moore to the Baltimore City Jail where the latter two visited Grandison two days before the shooting, inspected the reception desk area of the Warren House Hotel, and reported to the defendant concerning the people working there and the presence or absence of security features. Sparrow testified that, at the request of the defendant and with his funds, she obtained a room at the motel, was with the defendant in the immediate area of the [Motel] at the time of the shooting, and wiped down the smoking MAC-11 machine pistol handed to her by the defendant immediately after the shooting. She related that the defendant told her that he would receive $9,000.00 'if he knocked both of them off.' Harper's testimony involved activities of April 26, 27 and 28, 1983, and included a description of the defendant's acquisition of the machine pistol from Rodney Kelly, as well as the defendant's statement that he liked the gun.

Additional factual detail was set forth by the United States Court of Appeals for the Fourth Circuit in *Evans v. Smith*, 220 F.3d 306, 310 (2000), *cert. denied*, 532 U.S. 925, 121 S.Ct. 1367, 149 L.Ed.2d 294 (2001), as follows:

> During the state trial, the prosecution offered overwhelming incriminating evidence against Evans through a number of witnesses. The most damaging testimony came from Charlene Sparrow, who was Evans's girlfriend at the time of the murders. Sparrow testified that she accompanied Evans and Janet Moore to the Baltimore City Jail two days before the shooting. At the jail, Evans and Moore met with Grandison, who was awaiting his federal drug trial. Sparrow then inspected the reception desk area of the Warren House Motel. She reported to Evans concerning the people working there and the presence or absence of security features. Sparrow also obtained a room at the motel with Evans's funds at his request. On the day of the murders, Evans told Sparrow to wait for him in the car behind the motel. Just before Evans walked to the motel, Sparrow looked inside the brown canvas bag he was carrying and saw a machine gun. Some ten to fifteen minutes later, Evans returned to the car, gave the smoking MAC-11 machine pistol to Sparrow, and asked her to wipe it down. Evans had also told her that he would receive $9,000 'if he knocked both of them off.' Evans and Sparrow went to the mall that night to spend part of the proceeds from the murders.
>
> Other witnesses also supplied incriminating testimony as to Evans's central role in the murders. For example, Moore testified as to her and Evans's visit to Grandison at the jail two days before the killings. Calvin Harper testified concerning the day of the murder and the two days leading up to it. Harper's testimony included a description of Evans's acquisition of the machine pistol used in the

crime from Rodney Kelly and Evans's statement that he liked the gun. Several other witnesses were able to place Evans in the motel lobby during the time immediately preceding the [*295] murders. For example, Etta Horne, who worked at the motel, identified Evans as the man she saw sitting in the motel lobby shortly before the murders. Helen Kondilidis, who had entered the motel shortly before the murders, also identified Evans as the man she saw sitting in the lobby.

In a proceeding under the Maryland Uniform Post Conviction Procedure Act, now codified as Maryland Code (2001), §§ 7-101 through 7-301 of the Criminal Procedure Article, the Circuit Court for Worcester County on March 28, 1991, vacated Evans's death sentences on the authority of *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), and ordered a new capital sentencing proceeding. The Circuit Court refused, however, to vacate the guilty verdicts. This Court on June 4, 1991, denied both the State's and Evans's applications for leave to appeal.

Upon Evans's request for removal, the new sentencing proceeding was removed from the Circuit Court for Worcester County back to the Circuit Court for Baltimore County. At his resentencing hearing in 1992, Evans conceded that he was involved in the murders, although not as the "triggerman." During his allocution, "Evans apologized ... for causing pain to the victims' families, ... for being 'involved in this hideous crime,' ... and for allowing his drug-ridden life to twist him into 'the type of individual that would take two innocent lives'" (appellant's reply brief at 2). Evans's counsel at the 1992 sentencing hearing "conceded that the jury should check the box on the verdict sheet, indicating that Evans had been a principal in the first degree." Defense counsel "emphasized mitigation" and "argued that life imprisonment, rather than death, was the appropriate punishment." *Evans v. Smith*, 54 F.Supp.2d 503, 516 and n. 26 (D.Md. 1999), *affirmed*, *Evans v. Smith*, *supra*, 220 F.3d [306].

At the conclusion of the 1992 resentencing proceeding, the jury determined again that Evans should receive two death sentences, and this Court affirmed. *Evans v. State*, 333 Md. 660, 637 A.2d 117, *cert. denied*, 513 U.S. 833, 115 S.Ct. 109, 130 L.Ed.2d 56 (1994).

The present case began when Evans filed in the Circuit Court for Baltimore County a motion for a new trial based on allegedly newly discovered evidence, pursuant to Maryland Rule 4-331(c), and a separate motion to correct an illegal sentence, pursuant to Rule 4-345(a).[3] Hearings on the motions were held in April **[*296]** 2002 and December 2002. The Circuit Court filed on July 18, 2003, written opinions and orders denying the motions. Evans timely filed notices of appeal to this Court from each denial.

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[3] Rule 4-331(c) provides as follows:

(c) **Newly discovered evidence.**--The court may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to section (a) of this Rule:

(1) on motion filed within one year after the date the court imposed sentence or the date it received a mandate issued by the Court of Appeals or the Court of Special Appeals, whichever is later;

(2) on motion filed at any time if a sentence of death was imposed and the newly discovered evidence, if proven, would show that the defendant is innocent of the capital crime of which the defendant was convicted or of an aggravating circumstance or other condition of eligibility for the death penalty actually found by the court or jury in imposing the death sentence;

(3) on motion filed at any time if the motion is based on DNA identification testing or other generally accepted scientific techniques the results of which, if proven, would show that the defendant is innocent of the crime of which the defendant was convicted.

Rule 4-345(a) states: "**Rule 4-345. Sentencing-Revisory power of court.**

(a) **Illegal sentence.** The court may correct an illegal sentence at any time."

## II.

### A.

Generally under the Maryland death penalty statute, a "defendant found guilty of murder in the first degree may be sentenced to death only if," *inter alia*, "the defendant was a principal in the first degree...." Maryland Code (2002), § 2-202(a)(2)(i) of the Criminal Law Article.[4] There are two exceptions to this first degree principal limitation, one involving the murder of a law enforcement officer under certain conditions (§§ 2-202(a)(2)(ii) and 2-303(g)(1)(i)), and the other involving a contract murder (§§ 2-202(a)(2)(i) and 2-303(g)(1)(vii)). The last cited sections make a first degree murderer eligible for the death penalty if "the defendant employed or engaged another to commit the murder and the murder was committed under an agreement or contract for remuneration or promise of remuneration." *See generally Grandison v. State*, 341 Md. 175, 670 A.2d 398 (1995), *cert. denied*, 519 U.S. 1027, 117 S.Ct. 581, 136 L.Ed.2d 512 (1996).

As earlier summarized, Charlene Sparrow, who was Evans's girlfriend, had testified that, on the afternoon of the murders, she was with Evans in a car outside of the Warren House Motel, that Sparrow saw a machine gun in a brown canvas bag in Evans's possession, that Evans walked into the Motel with the bag, that Evans returned to the car ten to fifteen minutes later and handed the MAC-11 machine gun to Sparrow, that the machine gun was smoking, and that Evans told Sparrow to wipe the gun down. Etta Horne, an employee at the Warren House Motel, had identified Evans and testified that he was the African-American male whom she saw in the Motel lobby shortly before the murders. Helen Kondilidis, who was employed at the restaurant in the Warren House Motel, testified that, after she had returned from a dental appointment and shortly before the murders, she spoke with Piechowicz and Kennedy for about 20 min-

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[4] Hereafter in this opinion, unless otherwise indicated, all references to the Maryland Code will be to the Criminal Law Article.

utes in the lobby of the Motel. She also identified Evans as the man whom she saw in the lobby.

The "evidence" which Evans now claims is "newly discovered" would, according to Evans, impeach the testimony of Etta Horne and Helen Kondilidis identifying Evans as the African-American male in the Warren House Motel lobby shortly before the murders. Defense counsel's present theory, as indicated in his briefs and as more precisely delineated at oral argument before this Court, is that Evans participated in the murders but was not the "triggerman," that Evans took the bag with the MAC-11 machine gun from the car to the Motel, that Evans gave the gun to another African-American male at the Motel,[5] that this associate entered the lobby and was the man seen in the lobby, that the associate shot the victims Scott Piechowicz and Susan Kennedy who were at the front desk in the lobby, that the shooter then gave the MAC-11 machine gun to **[*297]** Evans, and that Evans carried the smoking gun back to the car and gave it to Charlene Sparrow.

Evans maintains that, if the jury at a new sentencing hearing were to accept this theory, Evans would not be a principal in the first degree and would not be eligible for the death penalty under the Maryland statute.

At the April 2002 hearing on the motion for a new trial, Evans proffered a report of an interview with Janet Bannister by agents of the Federal Bureau of Investigation (FBI). The interview report was on an FBI form displaying the number 302, and such interview reports are referred to by the parties as "302 reports." The Bannister interview report had previously been proffered by Evans in a motion to re-open a post conviction proceeding based upon a *Brady*

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[5] Evans's counsel at oral argument before us, in explaining the theory after being questioned by the Court, did not indicate exactly where the alleged transfer of the gun from Evans to the confederate may have taken place. A diagram of the Motel's first floor, contained in the record, shows that there was a small foyer between the front entrance and the lobby.

claim.[6] In addition, there was testimony that the report was contained in files available to Evans's attorneys since 1984. Evans also proffered at the April 2002 hearing transcripts of testimony by Janet Bannister, Roberta Weinstein, and Darece Pinkney.[7] This testimony had been given during earlier post conviction proceedings.[8]

Apparently as a result of a request under the federal Freedom of Information Act, the FBI in June 2002 discovered ten additional 302 reports of interviews by FBI agents of persons who were in the vicinity of the Warren House Motel on the afternoon of April 28, 1983. The interviews occurred on April 28, 29, 30, and May 5, 1983, and each report was written the same day as the interview. The FBI turned these 302 reports over to the State, and the State immediately turned them over to Evans's attorneys. In July 2002, Evans's attorneys obtained an eleventh additional 302 report from the attorney for Anthony Grandison. This report was of an interview on April 29, 1983, and it was transcribed the same day.

After receiving the additional 302 reports in June and July 2002, Evans's attorneys requested that the hearing on his motions be reopened. A second hearing was held by the Circuit Court on December 3, 2002, at which the additional eleven 302 reports were presented. The 302 report of the interview with Janet Bannister as well as the testimony which had been given by Janet Bannister, Roberta Weinstein, and Darece Pinkney at earlier post conviction proceedings, contained descriptions of the sole African-American male who was seen in the lobby of the Warren House Motel on the afternoon of April 28, 1983, shortly be-

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[6] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), *affirming Brady v. State*, 226 Md. 422, 174 A.2d 167 (1961).

[7] In the record and the several briefs, Ms. Pinkney's first name is variously spelled "Darece," "Derece," "Darese," and "Derese." For consistency, we shall use "Darece."

[8] For a discussion of the Bannister, Weinstein, and Pinkney testimony, *see Evans v. Smith*, *supra*, 220 F.3d at 311, 317-319.

fore the murders. Evans's attorneys argued before the Circuit Court that these descriptions of the man in the lobby contradicted the identification of Evans by Etta Horne and Helen Kondilidis and demonstrated that the African-American male in the lobby was someone other than Evans. Therefore, the argument continued, this other man, and not Evans, was the principal in the first degree. Evans's attorneys further argued that some of the additional 302 reports undermined Horne's and Kondilidis's identification of Evans because the persons interviewed had not seen Horne or Kondilidis in the lobby.

In its opinion denying the motion for a new trial, the Circuit Court initially pointed **[*298]** out that the Janet Bannister 302 report and the transcripts of testimony by Janet Bannister, Roberta Weinstein, and Darece Pinkney, all submitted at the April 2002 hearing, clearly did not constitute newly discovered evidence. Although the eleven additional 302 reports were in a sense deemed newly discovered, the Circuit Court indicated that the names of the persons interviewed and, for the most part, the substance of the reports had been known by Evans's attorneys, or had been available to them, for a long time. The Circuit Court analyzed each item proffered by Evans at the two hearings and held that the items did not constitute "newly discovered evidence which could not have been discovered by due diligence" within the meaning of Rule 4-331(c).[9] Alternatively, the court concluded that "none of the information ... contained [in the proffers] shows or tends to show ... that [Evans] was other than a principal in the first degree and guilty of grievous aggravating circumstances in [the] commission" of the two murders.

In this Court, Evans's counsel concedes that the "evidence" proffered at the April 2002 hearing, consisting of information provided by Janet Bannister, Roberta Weinstein, and Darece Pinkney, was "not 'newly discovered' under Rule

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[9] *See* n. 3, *supra*.

4-331...." (Appellant's brief at 1; appellant's reply brief at 11). Counsel for Evans argues, however, that the additional 302 reports presented at the December 2002 hearing did constitute "newly discovered" evidence under the Rule. Counsel contends that, in determining whether Evans should receive a new sentencing hearing based on newly discovered evidence, this Court should consider "the cumulative force of" Janet Bannister's, Roberta Weinstein's, and Darece Pinkney's testimony, which admittedly was not newly discovered, "together with the new 302 reports," which are claimed to be newly discovered. (Appellant's brief at 9).).[10] Evans's counsel's argument is as follows (*id.* at 13, 174 A.2d 167):

> The Newly Discovered 302 Reports, in Combination with the Testimony of the Three Other Witnesses Never Before Heard by Any Jury, Create a Substantial and Significant Possibility that a New Jury Would Find that Evans Was Not the Shooter and Therefore Is Ineligible for the Death Penalty.

The State responds by arguing that the Circuit Court did not abuse its discretion in denying Evans's motion for a new trial and that the evidence proffered by Evans at the April and December 2002 hearings did not constitute "newly discovered evidence which could not have been [earlier] discovered by due diligence" within the meaning of Rule 4-331(c). Alternatively, the State contends that the allegedly

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[10] Evans's present attorneys assert that the failure by Evans's previous counsel to present the testimony of Janet Bannister, Roberta Weinstein, and Darece Pinkney at Evans's original trial and sentencing proceeding, and at Evans's 1992 resentencing proceeding, was "because of negligence" and "because of blatant errors by Evans's counsel...." (Appellant's brief at 9, n. 3, and 22). Evans's present counsel acknowledge that a constitutional "ineffective-assistance-of-counsel claim based [on] this [alleged] error" was not successful (*id.* at 9, n. 3). *See Evans v. Smith*, *supra*, 220 F.3d at 316-321. In the case at bar, during oral argument before this Court, the Court asked Evans's present counsel whether he was again making or renewing the ineffective assistance of counsel argument, and present counsel stated that he was not making such an argument.

newly discovered evidence does not "show that there is a substantial possibility that the [decision] of the fact finder would have been different" at the 1992 resentencing. (Appellee's brief at 36).

**[*299] B.**

Preliminarily, we point out that Evans's motion for a new trial rests upon the underlying premise that a second degree principal "middleman" in a contract murder scheme is not eligible for the death penalty under the Maryland statute. Evans does not, by the allegedly newly discovered evidence, attempt to contradict the overwhelming evidence demonstrating that Grandison hired Evans, for $9,000.00, to commit the murders. Under Evans's current theory, Evans solicited an associate to do the actual shooting and handed the MAC-11 machine gun to the associate at the Motel. According to Evans, this other man then shot the two victims, handed the machine gun back to Evans, and Evans returned with the smoking gun to the automobile where Charlene Sparrow was waiting. Under this scenario and Evans's view of the Maryland death penalty statute, Grandison would be eligible for the death penalty because he engaged Evans to commit the murders under a promise of remuneration, and Evans's associate would be eligible for the death penalty because he was the principal in the first degree, but Evans would not be eligible for the death penalty because he was not the initial hirer and he committed the murders as a principal in the second degree.

At oral argument, this Court raised the question as to whether the underlying premise for Evans's argument was legally sound. In other words, is the "middleman" in a contract murder scheme, who is not the employer initiating the scheme, and who is guilty of the murder as an aider and abettor, i.e., as a principal in the second degree, eligible for the death penalty under the wording of the Maryland statute? An examination of the statutory language indicates that the premise for Evans's argument is reasonably debatable.

Under the Maryland death penalty statute, a death sentence cannot be imposed unless the State proves, beyond a reasonable doubt, that one or more of the statutorily enumerated aggravating circumstances exist. The statute, in § 2-303(g)(1) of the Criminal Law Article, sets forth ten "aggravating circumstances," although some of them cover alternative situations. The sixth and seventh aggravating circumstances are as follows:

> (vi) the defendant committed the murder under an agreement or contract for remuneration or promise of remuneration to commit the murder;
>
> (vii) the defendant employed or engaged another to commit the murder and the murder was committed under an agreement or contract for remuneration or promise of remuneration;....

Section 2-202(a) of the Criminal Law Article contains, *inter alia*, the first degree principal limitation. It provides in pertinent part as follows:

> (a) *Requirement for imposition.*--A defendant found guilty of murder in the first degree may be sentenced to death only if:
>
> * * *
>
> (2)(i) with respect to § 2-303(g) of this title, except for § 2- 303(g)(1)(i) and (vii) of this title, the defendant was a principal in the first degree;....

As earlier discussed, the contract murder encompassed by § 2-203(g)(1)(vii) is an exception to the first degree principal requirement. If § 2-203(g)(1)(vi) were not in the statute, the language of § 2-203(g)(1)(vii) would clearly appear to cover the "middleman" in the contract murder scheme. Thus, after Grandison hired Evans for $9,000.00 to commit the murders, if Evans had engaged another person to be the "triggerman," and the other person **[*300]** had shot the victims, with Evans aiding and abetting the murders, such conduct by Evans would certainly seem to be embraced by paragraph (vii) if that paragraph stood alone. The problem is that paragraph (vi) is the specific aggravating circum-

stance covering those who "committed the murder" or murders "under an agreement or contract for remuneration." One may be guilty "of having committed a particular offense" even though he or she was not the principal in the first degree. *Jones v. State*, 302 Md. 153, 161, 486 A.2d 184, 188 (1985).[11] Moreover, unlike paragraph (vii), paragraph (vi) is not listed in § 2-202(a)(2) as an exception to the first degree principal requirement.

Consequently, it is reasonably arguable that, under §§ 2-202(a)(2) and 2-203(g)(1)(vi) together, a principal who "committed the murder under an agreement or contract for remuneration" must have committed the murder as "a principal in the first degree" in order to be eligible for a death sentence..[12] In light of our conclusion in Part II C below, however, it is not necessary for us to decide this issue. We shall simply assume, *arguendo*, that Evans would not be eligible for the death penalty if he were a principal in the second degree.

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[11] Under Maryland law, one may commit an offense as either a principal in the first degree, or a principal in the second degree, or an accessory before the fact. With regard to felonies, Maryland case law draws substantive distinctions between principals and accessories, but normally it does not distinguish between principals in the first degree and principals in the second degree. *See, generally, e.g., State v. Sowell*, 353 Md. 713, 717-726, 728 A.2d 712, 714-719 (1999); *State v. Hawkins*, 326 Md. 270, 280-286, 604 A.2d 489, 494-497 (1992); *Sheppard v. State*, 312 Md. 118, 119-123, 538 A.2d 773, 773-775 (1988); *Osborne v. State*, 304 Md. 323, 332-335, 499 A.2d 170, 174-176 (1985); *Lewis v. State*, 285 Md. 705, 708-716, 404 A.2d 1073, 1074-1079 (1979); *State v. Ward*, 284 Md. 189, 191-192, 196-207, 396 A.2d 1041, 1043-1044, 1046-1052 (1978); *State v. Williamson*, 282 Md. 100, 382 A.2d 588 (1978); *Harvey v. State*, 111 Md.App. 401, 408-409, 681 A.2d 628, 631-632, *cert. denied*, 344 Md. 330, 686 A.2d 635 (1996).

[12] The particular statutory provisions covering contract murders, and the principalship requirements in contract murder situations, have not changed in substance since the present Maryland death penalty statute was first enacted in 1978. *See* Maryland Code (1957, 1976 Repl.Vol., 1979 Cum.Supp.), Art. 27, § § 413(d)(6), 413(d)(7), and 413(e)(1).

C.

The substantive standard governing the grant of a motion for a new trial under Rule 4-331(c) is whether the newly discovered evidence is sufficiently "material and persuasive such that '[t]he newly discovered evidence may well have produced a different result, that is, there was a substantial or significant possibility that the [decision] of the trier of fact would have been affected.'" *Campbell v. State*, 373 Md. 637, 666-667, 821 A.2d 1, 18 (2003), quoting *Yorke v. State*, 315 Md. 578, 588, 556 A.2d 230, 235 (1989). We fully agree with the Circuit Court and the State that the allegedly newly discovered evidence fails to create a substantial possibility that a jury would find that Evans was not the "triggerman." In affirming the denial of the new trial motion on this ground, we shall again assume, arguendo, that the eleven additional 302 reports submitted at the December 2002 hearing constituted "newly discovered evidence which could not have been [earlier] discovered by due diligence" within the meaning of Rule 4-331(c). We shall also assume, for purposes of this appeal, that we should consider "the cumulative force of" the eleven additional 302 reports together with the "evidence" from Janet Bannister, Roberta **[*301]** Weinstein, and Darece Pinkney which was admittedly not "newly discovered."

The testimony and "newly discovered" statements now relied on by Evans to impeach the testimony of Etta Horne and Helen Kondilidis fall into two categories.

*First*, some of the testimony and one of the statements consist of descriptions of the African-American male seen in the Motel lobby or the vicinity of the Motel shortly before the murders, which differ from Etta Horne's and Helen Kondilidis's identification of Evans. The testimony of Roberta Weinstein, Janet Bannister, and Darece Pinkney, and the Bannister 302 report, fall into this category.

*Second*, several of the statements in the 302 reports are to the effect that, at various times between 2:45 p.m. and 3:15 p.m. on April 28, 1983, the witnesses saw no one in the Motel lobby except Piechowicz and Kennedy, or that the

lobby was empty, or that Etta Horne and Helen Kondilidis were not in the lobby at the time when they had testified to being in the lobby. The 302 reports of statements by Hessie Hightower, Alan Summerfield, Mary Lefkowitz, Ruth Blatt, Evelyn Pushkin, and Marie Valle fall into this category and are relied upon by Evans as impeaching Etta Horne's and, more particularly, Helen Kondilidis's testimony.

The testimony and statements on which Evans now relies simply represent examples of the well-known phenomena that different witnesses' descriptions of a person or estimates of time will often vary to a considerable extent. *See, e.g., United States v. Wade*, 388 U.S. 218, 228, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149, 1158 (1967) ("The vagaries of eyewitness identification are well-known"), and authorities there cited. The testimony and statements do not create a significant possibility that a jury would find that Evans was not the principal in the first degree.

Moreover, other courts have previously analyzed much of the "evidence" now relied on by Evans and have concluded that it was unpersuasive. For example, Evans relies heavily on the testimony of Roberta Weinstein which described the gunman, and Darece Pinkney who lived two doors from the Motel and saw an African-American male run past her door. This testimony had previously been analyzed by the Circuit Court for Baltimore County, the United States District Court for the District of Maryland, and the United States Court of Appeals for the Fourth Circuit. The latter court reviewed the testimony as follows (*Evans v. Smith, supra*, 220 F.3d at 317, 319-320):

> Both Weinstein and Pinkney testified at Evans's second state post-conviction proceeding in 1996. Weinstein testified that, while working in her jewelry store in the Warren House, she heard a sound 'like glass crashing' and ran to the store window. She then saw the back and side of the gunman through the window from a distance of approximately thirty feet. She stated that she 'really could not see' the gunman's face and could not discern his

race. Weinstein estimated the gunman's height as 5'7" or 5'8", whereas Evans is 5'2". Weinstein could not identify Evans as the shooter at a line-up shortly after the incident, and upon viewing Evans in the courtroom, she stated that the shooter was 'a lot taller.' She further stated that there may have been another person in the lobby at the time, but she was not sure and could not give any details about this possible individual.

Pinkney testified that shortly after the shooting, while standing on her front porch about two doors down from the Warren House Motel, she 'saw a man just streak past [her] door,' from the **[*302]** direction of the motel. Pinkney stated that the individual was black and estimated the person's height to be about 5'8" or 5'9". Upon viewing Evans in the courtroom as he stood at counsel's table, she claimed that the individual she saw fleeing was 'much taller.' Weinstein and Pinkney each testified as well that the individual they saw was wearing a light-colored top and dark pants, whereas Sparrow stated that Evans had worn a suit to the motel that day. Both Weinstein and Pinkney gave statements prior to Evans's guilt/innocence trial, and both seemed to be willing to testify at Evans's resentencing had they been called."

* * *

As noted, the state's evidence against Evans on the question of principalship was simply overwhelming. The state presented testimony that Grandison had hired Evans to kill the Piechowiczs and that Evans stated he would receive $9,000 'if he knocked both of them off.' A number of witnesses placed Evans in the lobby near the time of the shootings. Sparrow testified that Evans carried a canvas bag with a gun in it to the motel shortly before the murders and was carrying the smoking machine pistol shortly after the murders. Chester

> [Evans's then attorney] herself acknowledged that Sparrow's testimony 'pretty much put the nails in our coffin because I couldn't seem to impeach her.' In addition, Harper testified as to Evans's acquisition of the gun from Kelly and Evans's statement that he liked the gun.
>
> Against this mountain of evidence, there is little possibility that the testimony of Weinstein and Pinkney would have made a difference. Weinstein estimated the gunman's height from a distance of thirty to thirty-five feet and was unable to see his face or discern his race. Further, the district court noted that Weinstein had overestimated the height of Scott Piechowicz by three to four inches, and her estimate of the gunman's height as 5'7" or 5'8" was based partly on her belief that Scott was 'a head taller' than the gunman. As for Pinkney, she did not see the shooting but merely described an individual who had suddenly 'streaked' past her front porch. Finally, even if counsel had presented this rather weak evidence, it likely would still have been in the context of what was primarily a mitigation strategy.

Evans also relies on the statements of Janet Bannister, which the United States Court of Appeals reviewed as follows (220 F.3d at 323):

> Evans's proffer of Bannister's testimony shows that such evidence would hardly undermine confidence in the juries' conclusions. Bannister would essentially testify that shortly before the murders she saw a neatly dressed African-American man in the lobby who at one point stood next to her and whom she would estimate to be around 5'7"or 5'8". Bannister would also claim that there was a tan duffel bag near where the man had been seated and that she and Helen Kondilidis were not in the lobby at the same time. These inconclusive observations amount to little in light of the copious testimony

> that proves, *inter alia*, that Evans contracted with Grandison to murder the Piechowiczs; that Evans carried a gun of the same type used in the murders into the motel shortly before the shootings; that Evans was in the motel lobby shortly before the killings occurred; and that Evans was seen literally carrying a smoking gun very shortly after Kennedy and Piechowicz were gunned down."

**[*303]** The court below, in denying Evans's motion for a new trial, added the following with regard to Janet Bannister's statements:

> Janet Bannister did not witness the murders of Susan Kennedy and Scott Piechowicz on April 29, 1983.
>
> Janet Bannister does not know who was present in the lobby of the Warren House Hotel after she departed on April 29, 1983. * * *
>
> Janet Bannister was focused on clipping coupons and not the person standing next to her asking for change. * * *
>
> Janet Bannister believes Scott Piechowicz was as tall as six feet four inches (6'4"). Janet Bannister overestimated Scott Piechowicz's height by three to four inches despite knowing him for many years. * * *
>
> Janet Bannister believed the person asking for change to be from five feet five inches (5'5") to five feet eight inches (5'8"). * * * Ms. Bannister overestimated Scott Piechowicz's height by three to four inches. An overestimation of the person seeking change by three to four inches means that person was the approximate height of the Defendant.
>
> On October 20, 1999, Judge James T. Smith, Jr., in addressing the merits of the Janet Bannister information contained in the April 29, 1983 FBI Form 302, ruled:

> 'the alleged Janet Bannister statement is insufficient to support a reasonable probability that, had this evidence been disclosed to the defense, the result of the re-sentencing proceeding would have been different.'

Evans relies on the 302 reports of interviews with Hessie Hightower and Alan Summerfield, each of whom stated that they passed through the Motel lobby at approximately 2:45 p.m. on April 28, 1983. Mrs. Hightower stated that the only person she then saw in the lobby was Scott Piechowicz, and Mr. Summerfield stated that "he did not notice anyone there." The 302 report of an interview with Mary Lefkowitz, also relied upon by Evans, recited that Mrs. Lefkowitz "left the Warren House [Motel] at approximately 2:50 p.m. [on April 28, 1983, and that there] was no one in the lobby of the Warren House."

The 302 report of an interview with Ruth Blatt, relied on by Evans, indicates that Mrs. Blatt arrived at the Needlepoint Shop in the Motel, adjacent to the lobby and front desk, "at approximately 2:15 p.m." on April 28, 1983, and that, after making her purchase, she left the Shop "between 3 and 3:15 p.m." Mrs. Blatt "advised that she did not recall seeing anyone in the lobby, nor did she observe anything that seemed unusual."

The 302 reports of interviews with Evelyn Pushkin and Marie Valle, both of whom were employed at the Village Beauty Salon located in the basement of the Warren House Motel, indicated that both women left the Beauty Salon together and separated in the Motel lobby, "at approximately 3:15 p.m." on April 28, 1983, with Pushkin exiting by the front door of the Motel and Valle exiting by the back door. Ms. Pushkin stated that she saw Susan Kennedy and Scott Piechowicz at the front desk but that otherwise "the lobby [was] empty." According to the Marie Valle 302 report, "Valle observed no one in the lobby of the Warren House...."

Evans asserts that the above-summarized 302 reports "undermine" Etta Horne's and Helen Kondilidis's testimony, because the persons interviewed did not see Horne or

Kondilidis in the lobby. (Appellant's brief at 15). In our view, however, the 302 reports neither impeach the testimony of Horne and Kondilidis nor **[*304]** show that the triggerman was an African-American male other than Evans.

Etta Horne had testified that she merely "stopped by the front desk" on her way upstairs, that the time was "about 2:45" on April 28, 1983, and that she saw Evans sitting in the lobby. Ms. Horne did not say how long she was at the front desk. Consequently, there was nothing inherently inconsistent between Etta Horne's testimony and the above-summarized statements that, at various moments between "approximately" 2:45 p.m. and 3:15 p.m., persons walking past the lobby did not see anyone in the lobby. Ms. Horne may have stopped at the front desk shortly before Mrs. Hightower and Mr. Summerfield passed through the lobby at "approximately" 2:45 p.m., or shortly after they passed through the lobby. Ms. Horne may have momentarily stopped by the front desk just before or just after Mrs. Lefkowitz left the Motel "at approximately 2:50 p.m."

Helen Kondilidis had testified that she went to the Warren House Motel at "approximately" or "right around 3:00" p.m. on April 28, 1983, that she spoke to Scott Piechowicz and Susan Kennedy who were at the front desk, that a man whom she identified as Evans was seated in the lobby, that she spoke to a woman named Harriet Friedman in the lobby, and that she was in the lobby "approximately" twenty minutes or "somewhere between twenty minutes and a half an hour."

Helen Kondilidis's testimony is entirely consistent with the statements by Hessie Hightower, Alan Summerfield, and Mary Lefkowitz, who said that they passed through the lobby at 2:45 p.m. and 2:50 p.m. on April 28, 1983. If Ruth Blatt walked past the lobby at 3:00 p.m., the initial time in her estimated time bracket, and Helen Kondilidis entered the Motel a minute or so later, Mrs. Blatt would not have seen Helen Kondilidis.

The 302 report of the interview with Alan Summerfield also states that he returned to the Warren House Motel after the shooting and saw "Helen Ann," presumably Helen Kondilidis, in the downstairs restaurant. The 302 report then states: "She had been to the dentist at the time of the shooting." The report does not indicate the source of this statement, *i.e.*, whether it is surmise by the FBI agent or by Summerfield. The 302 report does not say that Helen Kondilidis told Alan Summerfield that she was at the dentist at the time of the shooting. Consequently, the report does little to impeach Helen Kondilidis's testimony.

Moreover, it is obvious that the "triggerman" was in the lobby shortly before the murders, yet none of the above-mentioned persons, whose interviews are summarized in the additional 302 reports, saw a man in the lobby other than Scott Piechowicz. They also did not purport to see anyone in the Motel foyer. In addition, some of these witnesses apparently did not see the victims in the lobby. If these persons walking past or through the lobby did not see the "triggerman," and if some did not even see the victims, it is entirely understandable that they would not have seen Etta Horne or Helen Kondilidis.

Evans uses the additional 302 reports primarily to challenge Helen Kondilidis's testimony. The court below pointed out, however, that "Helen Kondilidis told the first responding police officer that she had been in the lobby ten (10) minutes before the shooting and gave a description of an individual she saw in the lobby," that "Harriet Friedman saw Helen Kondilidis in the lobby of the Warren House approximately ten (10) to fifteen (15) minutes before the shooting," and that "Susan Kennedy told Helen Kondilidis that Janet Bannister had just been in the lobby asking for change." The Circuit Court also emphasized **[*305]** that Helen Kondilidis's identification of Evans as the person she saw in the lobby was corroborated by a great deal of other evidence, including "the identification of Vernon Evans by Etta Horne."

It is undisputed, from Charlene Sparrow's testimony and Evans's admissions, that Evans was directly involved in the shooting, that shortly before the murders he carried the machine gun from the automobile into the Motel in a brown canvas bag, and that he later returned to the automobile with the smoking machine gun. There has never been any evidence of two African-American males being in, or in the immediate vicinity of, the Warren House Motel at or near the time of the shooting. In fact, there has never been a shred of evidence that anyone involved in the murders, other than Evans and Sparrow, was on the scene.

Evans's present argument is based upon a farfetched theory unsupported by any evidence. It rests entirely upon the well-known fact that eyewitness descriptions of an individual or estimates of time will likely vary. In our view, there is virtually no possibility that any jury would find that Evans was involved in the murders only as a principal in the second degree. The evidence that Evans was the "trigger-man" is overwhelming.

III.

We shall now turn to Evans's *ex post facto* argument.

A.

As previously pointed out, the Maryland death penalty statute prohibits the imposition of a death sentence unless the prosecution proves, beyond a reasonable doubt, that one or more of the statutorily enumerated aggravating circumstances exist. In a capital sentencing proceeding, if the trier of facts unanimously finds that the prosecution has proven, beyond a reasonable doubt, the existence of one or more statutory aggravating circumstances, the fact-finder is then required to consider mitigating circumstances. Before addressing Evans's *ex post facto* argument, it is important to review the nature of "mitigating circumstances" under the Maryland death penalty statute. Section 2-303(h)(2) of the statute provides:

> (2) If the court or jury finds beyond a reasonable doubt that one or more of the aggravating circum-

stances under subsection (g) of this section exist, it then shall consider whether any of the following mitigating circumstances exists based on a preponderance of the evidence:

(i) the defendant previously has not:

1. been found guilty of a crime of violence;

2. entered a guilty plea or a plea of nolo contendere to a charge of a crime of violence; or

3. received probation before judgment for a crime of violence;

(ii) the victim was a participant in the conduct of the defendant or consented to the act that caused the victim's death;

(iii) the defendant acted under substantial duress, domination, or provocation of another, but not so substantial as to constitute a complete defense to the prosecution;

(iv) the murder was committed while the capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired due to emotional disturbance, mental disorder, or mental incapacity;

**[*306]** (v) the defendant was of a youthful age at the time of the murder;

(vi) the act of the defendant was not the sole proximate cause of the victim's death;

(vii) it is unlikely that the defendant will engage in further criminal activity that would be a continuing threat to society; or

(viii) any other fact that the court or jury specifically sets forth in writing as a mitigating circumstance in the case.

After the consideration of mitigating circumstances, the trier of facts next determines whether the aggravating cir-

cumstances outweigh whatever mitigating circumstances are found to exist. *See* § 2-303(i).

While the statutory language refers to the existence of mitigating circumstances "based on a preponderance of the evidence," it does not require that the defendant establish mitigating circumstances by a preponderance of the evidence. This Court has consistently construed the above-quoted language of § 2-303(h)(2) to mean only that the prosecution does not have the burden of disproving the existence of mitigation and that the defendant bears only a *risk* of nonproduction or nonpersuasion. The Court explained in *Foster v. State*, 304 Md. 439, 474-475, 499 A.2d 1236, 1254 (1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3310, 92 L.Ed.2d 723 (1986), referring to its earlier decision in *Tichnell v. State*, 287 Md. 695, 730, 415 A.2d 830, 848 (1980), as follows (emphasis supplied):

> We went on to point out, however, that as § [2-303(h)(2) "does not require the prosecution to disprove the existence of mitigation," it does place "on the accused the risk of nonproduction and nonpersuasion." ... Nevertheless, regardless of what evidence a defendant himself may or may not produce, or regardless of any mitigating argument he may or may not advance, if the jury perceives from the case a fact or circumstance concerning the crime or the defendant, which the jury deems to be mitigating, it may treat it as such. As to mitigation, it is only the *risk* of nonproduction or nonpersuasion which the defendant bears.
>
> Moreover, § [2-303(h)(2)(viii)] includes as mitigating circumstances "[a]ny other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case."
>
> * * *
>
> Therefore, the defendant erroneously argues that "if the defendant fails to meet his burden of proof and persuasion" concerning mitigating cir-

> cumstances, death "may be mandated where the sentencer is unconvinced that death is the appropriate punishment." ... *A sentencing authority, unconvinced that death is appropriate, may list as a mitigating circumstance whatever factor or factors may have led to this conclusion, irrespective of what the defendant produced or argued.* If the sentencing authority perceives anything relating to the defendant or the crime which causes it to believe that death may not be appropriate, it may treat such factor as a mitigating circumstance and decide that it outweighs the aggravating circumstances.

*See also, e.g., Conyers v. State*, 354 Md. 132, 168, 729 A.2d 910, 929, *cert. denied*, 528 U.S. 910, 120 S.Ct. 258, 145 L.Ed.2d 216 (1999) ("It is important, and we strongly admonish trial judges, to explain to the jury that a § [2-303(h)(2)(viii) ] mitigating factor is anything relating to the defendant or the crime which causes it to believe that death may not be appropriate **[*307]** and to make clear that, in considering mitigating factors, the word 'evidence' as used in the sentencing form has a far broader meaning than just testimony and exhibits") (internal quotation marks omitted); *Bruce v. State*, 328 Md. 594, 620, 616 A.2d 392, 405 (1992), *cert. denied*, 508 U.S. 963, 113 S.Ct. 2936, 124 L.Ed.2d 686 (1993) ("As we indicated in *Foster*, the ability of the jury to consider any factor as a mitigator, not only those introduced by the defendant, is crucial to the non-mandatory character of the [Maryland] death penalty statute"); *Harris v. State*, 312 Md. 225, 254, 257, 539 A.2d 637, 651, 652 (1988) (" '[T]he content of a convicted defendant's allocution may be considered by the jury or court in mitigation....' * * * Harris is incorrect in insisting that he had, in the traditional sense, the 'burden of proof' as to mitigating circumstances. Although he had the risk of nonproduction and of nonpersuasion, a court could not have directed the jury to find against him on this issue, even if he produced no specific evidence at all, and even if he failed to argue it"); *Mills v. State*, 310 Md. 33, 55, 527 A.2d 3, 13 (1987), *vacated on other grounds*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988) ("[A]s long as one ju-

ror perceives any factor relating to the crime or the defendant which he regards as a mitigating factor and which he believes is not outweighed by aggravating circumstances, the jury will not be able to determine that the sentence shall be death. * * * [I]f a juror does not believe that death is the appropriate punishment, whatever factor relating to the crime or the defendant that led to such belief may be regarded by that juror as a mitigating circumstance not outweighed by aggravating circumstances").

The Maryland death penalty statute, in § 2-303(h)(2), contains seven short paragraphs setting forth mitigating circumstances, and an eighth paragraph encompassing "any other fact that the court or jury" views as a mitigating circumstance. There is one difference between those factors listed in the first seven paragraphs and the virtually limitless number of factors that may be encompassed by the eighth paragraph, although the difference is relatively small. As to the first seven factors, the Legislature has made a judgment that, if present, they should be regarded as mitigating. With regard to any factors proposed by the defense or by any juror to be considered under the eighth paragraph, it is for each juror to make the judgment of whether it should be regarded as mitigating. *See Foster v. State*, *supra*, 304 Md. at 482, 499 A.2d at 1258. With respect to the *existence* of a mitigating circumstance or the *weight* to be given that particular circumstance, however, there is no difference between mitigating circumstances under the first seven paragraphs and those under the eighth paragraph.

Prior to 1983, the fourth paragraph of mitigating factors read as follows (Maryland Code (1957, 1982 Repl.Vol.), Art. 27, § 413(g)(4), italics added):

> The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, emotional disturbance, *or intoxication.*

By Ch. 296 of the Acts of 1983, the Legislature deleted the above-italicized words "or intoxication" from the fourth paragraph and decided that intoxication should be considered in a capital sentencing proceeding under the eighth paragraph. The Legislature set forth a "Preamble" to Ch. 296 as follows (II Laws of Maryland 1983 at 1045):

> [*308] The General Assembly is aware that the Supreme Court has held that evidence of the intoxication of a defendant in a case involving the death penalty must be allowed and considered as a factor in mitigation. The General Assembly further believes that such mitigating factor should be considered under the eighth mitigating factor and not highlighted specifically so as to appear more as justification than as one of the many factors that may be considered as possible mitigation. In striking the word intoxication from the fourth mitigating factor, the General Assembly is not eliminating the consideration of intoxication, but altering the emphasis presently indicated....

Thus, the Legislature believed that a murder defendant's impaired capacity because of intoxication should be in a different category than impaired capacity caused by mental or emotional disorders. Nevertheless, the Legislature clearly did not intend to preclude consideration of intoxication as a mitigating circumstance.

Ch. 296 of the Acts of 1983 was passed by the General Assembly before Evans murdered Scott Piechowicz and Susan Kennedy on April 28, 1983. The effective date of Ch. 296, however, was July 1, 1983, after the murders took place.

At Evans's original sentencing proceeding in 1985, and at his resentencing proceeding in 1992, the trial judges instructed the juries concerning mitigating circumstances based on the statute as amended by Ch. 296 of the Acts of 1983. Evans did not object to these particular instructions; he raised no issue based on Ch. 296 in his two direct appeals; he raised no such issue in his state post conviction proceedings, and he did not raise the issue in his federal habeas cor-

pus proceedings. In his present motion to correct an illegal sentence, Evans for the first time argues that the jury instruction based on Ch. 296 of the Acts of 1983, rather than an instruction based on the statute as it read prior to the 1983 amendment, was in violation of the *ex post facto clauses* of the federal and state constitutions. Evans primarily relies on the Supreme Court's decision in *Carmell v. Texas*, 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000).

**B.**

The State argues that the *ex post facto* issue now presented by Evans does not relate to the legality of the sentence itself and, accordingly, may not properly be raised in a motion to correct an illegal sentence under Maryland Rule 4-345(a). The State also argues that, by failing to raise the issue previously, Evans has waived any objection to the jury instruction based upon the statute as amended by Ch. 296 of the Acts of 1983.

Evans replies that a jury instruction error such as allegedly occurred here, which, in his view, may have affected the jury's finding regarding intoxication as a mitigating factor, does relate to the legality of the sentence. (Appellant's reply brief at 16-18). Evans further argues that the failure to object to the instruction or to raise the issue previously does not result in a waiver because, under Rule 4-345(a), a "court may correct an illegal sentence at any time." (*Id.* at 18-19). *See, e.g., State v. Kanaras*, 357 Md. 170, 180, 742 A.2d 508, 514 (1999), quoting *Coles v. State*, 290 Md. 296, 303, 429 A.2d 1029, 1032 (1981) ("'A trial court clearly has the authority and responsibility to correct an illegal sentence at any time, ... and the refusal to do so, no matter when the correction request is made, is appealable.'"); *Walczak v. State*, 302 Md. 422, 427, 488 A.2d 949, 951 (1985) ("[A] defendant who fails to object to the imposition of an illegal sentence **[*309]** does not waive forever his right to challenge that sentence").

The State correctly argues that, as a general rule, a Rule 4- 345(a) motion to correct an illegal sentence is not ap-

propriate where the alleged illegality "did not inhere in [the defendant's] sentence." *State v. Kanaras, supra*, 357 Md. at 185, 742 A.2d at 517. A motion to correct an illegal sentence ordinarily can be granted only where there is some illegality in the sentence itself or where no sentence should have been imposed. *See, e.g., Ridgeway v. State*, 369 Md. 165, 171, 797 A.2d 1287, 1290 (2002); *Holmes v. State*, 362 Md. 190, 763 A.2d 737 (2000); *Moosavi v. State*, 355 Md. 651, 662-663, 736 A.2d 285, 291 (1999). On the other hand, a trial court error during the sentencing proceeding is not ordinarily cognizable under Rule 4-345(a) where the resulting sentence or sanction is itself lawful. *Randall Book Corp. v. State*, 316 Md. 315, 323, 558 A.2d 715, 719 (1989) ("[W]hile improper motivation may justify vacation of the sentence, it does not render the sentence illegal within the meaning of Rule 4-345. Appellant did not raise this contention on direct appeal and may not do so here"). *See also Hill v. United States*, 368 U.S. 424, 430, 82 S.Ct. 468, 472, 7 L.Ed.2d 417, 422 (1962).

Nevertheless, this Court has appeared to recognize an exception to the above-summarized principles where, in a capital sentencing proceeding, an alleged error of constitutional dimension may have contributed to the death sentence, at least where the allegation of error is partly based upon a decision of the United States Supreme Court or of this Court rendered after the defendant's capital sentencing proceeding. *Oken v. State*, 378 Md. 179, 835 A.2d 1105 (2003), *cert. denied*, --- U.S. ----, 124 S.Ct. 2084, 158 L.Ed.2d 632 (2004), was a Rule 4-345 proceeding to correct an illegal or irregular sentence. The defendant Oken argued, relying on recent Supreme Court cases, that a constitutional error in the capital sentencing proceeding contributed to the death sentence. Section 2-303(i) of the Maryland death penalty statute provides that the trier of facts "shall determine by *a preponderance of the evidence* whether the aggravating circumstances under subsection (g) of this section outweigh the mitigating circumstances." (Emphasis added). In *Oken*, the case was presented to the sentencing jury under this "preponderance of the evidence" standard. The defendant Oken had raised no objection to this in the sentencing proceeding

or in a prior post conviction proceeding. In the Rule 4-345 proceeding, however, Oken argued that the preponderance of the evidence standard violated due process and that a "beyond a reasonable doubt" standard was constitutionally required. This Court, in the Rule 4-345 proceeding, resolved the merits of the constitutional issue, with the majority holding that application of the "preponderance of the evidence" standard was constitutional. *See also Oken v. State*, 367 Md. 191, 195, 786 A.2d 691, 693 (2001), *cert. denied*, 535 U.S. 1074, 122 S.Ct. 1953, 152 L.Ed.2d 855 (2002), where the Court decided the merits of a similar challenge by the defendant Oken.

Evans, like Oken, claims that a provision of the Maryland death penalty statute was unconstitutionally applied to him at his capital sentencing proceeding and that this alleged error may have resulted in the death sentence. Also, as in the *Oken* cases, Evans chiefly relies upon a United States Supreme Court opinion rendered after his 1992 capital sentencing proceeding, namely *Carmell v. Texas*, *supra*, 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577. With regard to the availability of a proceeding under Rule 4-345(a), we perceive no significant differences between the **[*310]** *Oken* cases and the present case. Consequently, we shall decide the merits of Evans's *ex post facto* argument.

C.

The leading opinion on the *Ex Post Facto* Clause of the United States Constitution is Justice Samuel Chase's opinion in *Calder v. Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798).[13] Jus-

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[13] This Court has stated that the *Ex Post Facto* Clause "'in the Maryland Declaration of Rights ... has been viewed as having the same meaning as the federal prohibition.'" *Gluckstern v. Sutton*, 319 Md. 634, 665, 574 A.2d 898, 913, *cert. denied*, 498 U.S. 950, 111 S.Ct. 369, 112 L.Ed.2d 331 (1990), quoting *Anderson v. Department of Health & Mental Hygiene*, 310 Md. 217, 223, 528 A.2d 904, 907 (1987), *cert. denied*, 485 U.S. 913, 108 S.Ct. 1088, 99 L.Ed.2d 247 (1988). *See also Booth v. State*, 327 Md. 142, 169 n. 9, 608 A.2d 162, 175 n.9 (1992).

tice Chase there stated (3 Dall. at 390, 1 L.Ed. at 650, emphasis in original):

> I will state *what laws* I consider *ex post facto laws*, within the words and the *intent* of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender.*

The Supreme Court recently reaffirmed the continuing viability of Justice Chase's four categories of laws falling within the *ex post facto* prohibition, flatly rejecting the federal government's argument "that Justice Chase simply got it wrong with his four categories." *Carmell v. Texas*, *supra*, 529 U.S. at 535, 120 S.Ct. at 1634, 146 L.Ed.2d at 596. Even more recently, the Court in *Stogner v. California*, 539 U.S. 607, 123 S.Ct. 2446, 2450, 156 L.Ed.2d 544 (2003), stated:

> [T]he kind of statute at issue falls literally within the categorical descriptions of *ex post facto* laws set forth by Justice Chase more than 200 years ago in *Calder v. Bull*, *supra*,--a categorization that this

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The Maryland Declaration of Rights was the first bill of rights to contain a constitutional prohibition against *ex post facto* laws. *Anderson*, 310 Md. at 223 n. 4, 528 A.2d at 907 n. 4; H.H. Walker Lewis, *The Maryland Constitution-1776*, at 45 (1976); 1 Bernard Schwartz, *The Bill of Rights: A Documentary History*, at 279 (N.Y.1971). The Maryland Declaration of Rights was drafted in August 1776, on a motion by Samuel Chase made in the Maryland Constitutional Convention. It was drafted by a committee of seven which included Samuel Chase himself. Schwartz, *supra*, at 279. *See also Telnikoff v. Matusevitch*, 347 Md. 561, 585, 702 A.2d 230, 242 (1997).

> Court has recognized as providing an authoritative account of the scope of the *Ex Post Facto* Clause. *Collins v. Youngblood*, 497 U.S. 37, 46, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990); *Carmell, supra*, at 539, 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577.

The argument that the federal and state *ex post facto* clauses preclude the application of Ch. 296 of the Acts of 1983 to a capital sentencing proceeding occurring after 1983, but based on murders committed prior to July 1, 1983, was made and rejected by this Court in *Booth v. State*, 327 Md. 142, 168- 176, 608 A.2d 162, 174-179 (1992). Booth argued as follows (Briefs, September Term 1991, No. 20, appellant's brief at 81):

> [C]h. 296 of the 1983 Laws 'alter[ed] the legal rules of evidence' so as to **[*311]** require the defense to produce more proof of mitigation in order to obtain a sentence of life imprisonment.... Before the enactment, a defendant received mitigating consideration on proof by a preponderance of evidence that his intoxication substantially impaired his capacity to appreciate the criminality of his conduct or conform his conduct to the requirement of the law. The effect of the enactment was to require him to prove this fact and, in addition, prove by a preponderance of evidence that it mitigated the crime.

In holding that the application of Ch. 296 did not violate the *ex post facto* prohibition, this Court in *Booth* emphasized that, "[b]oth before and after the 1983 amendment, the amount of weight to be given to intoxication as a mitigating circumstance turned on the judgment of each individual juror." 327 Md. at 169-170, 608 A.2d at 175. The *Booth* opinion went on to point out that the change created by Ch. 296 was only a relatively minor change in trial sentencing procedure, and that "[c]hanges in trial ... procedure that had consequences far more disadvantageous to the defendant than the change in Maryland's [capital sentencing statute] have been held not to offend the *ex post facto* clause[s]," citing, *inter*

*alia*, *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990), and *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). *Booth*, 327 Md. at 170, 608 A.2d at 175.

The Court in *Booth* also distinguished our earlier holdings in *Gluckstern v. Sutton*, 319 Md. 634, 574 A.2d 898, *cert. denied*, 498 U.S. 950, 111 S.Ct. 369, 112 L.Ed.2d 331 (1990), and *Anderson v. Department of Health and Mental Hygiene*, 310 Md. 217, 528 A.2d 904 (1987), *cert. denied*, 485 U.S. 913, 108 S.Ct. 1088, 99 L.Ed.2d 247 (1988), both of which had been relied on by the defendant. The *Booth* opinion stated that neither *Gluckstern* nor *Anderson* involved a change in trial procedure during the sentencing phase of a trial, and that both of these earlier decisions "dealt with changes which had the effect of 'mak[ing] more burdensome the punishment for a crime,'" which was a violation of the *ex post facto* prohibition. *Booth*, 327 Md. at 175, 608 A.2d at 178.

In the case at bar, Evans argues that the application of Ch. 296 of the Acts of 1983 at the 1992 resentencing proceeding violated the *ex post facto* prohibition

> because it imposed on Evans a new and more burdensome burden of proof. The Supreme Court made clear in *Carmell v. Texas*, 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000), that such changes in the burden of proof are constitutionally prohibited; *Carmell* thus effectively overruled this Court's 1992 decision in *Booth* ....

(Appellant's brief at 33).

According to Evans, the change in sentencing procedure could not be applied to him because of the fourth category articulated in *Calder v. Bull*, *supra*, as explained by the Supreme Court in *Carmell v. Texas*, *supra*.

The Court in *Carmell v. Texas* reviewed a change in the Texas penal code concerning the evidence required for a conviction of certain sexual offenses committed against children under specified circumstances. Prior to September 1, 1993, Texas law provided that if the victim of certain sexual

offenses was 14 years of age or older, and if the victim had not reported the alleged offense to another person within six months after the offense allegedly occurred, the victim's uncorroborated testimony could not support a criminal conviction. If such victim's testimony was not corroborated, the evidence was deemed insufficient to sustain a conviction, and the **[*312]** defendant was entitled to a judgment of acquittal. If, however, the victim was under 14 years of age, the defendant could be convicted on the victim's testimony alone. Effective September 1, 1993, Texas law was changed to raise the age from 14 to 18, so that corroboration of the victim's testimony was required only if the victim was 18 or older.

The defendant in *Carmell* was convicted, *inter alia*, of four charges of committing sexual offenses against his stepdaughter between June 1992 and July 1993, when the victim was 14 or 15 years old, with the convictions being based solely on the victim's testimony. The Texas courts applied the new statute to these charges, holding that the victim's testimony did not have to be corroborated and that retroactive application of the statutory change did not violate the *ex post facto* prohibition. The United States Supreme Court, however, reversed, holding that the federal constitution's *Ex Post Facto Clause* precluded application of the new statute to the offenses committed before its effective date.

The Supreme Court's *Carmell* opinion discussed the historical background of Justice Chase's fourth category of prohibited *ex post facto* laws and reaffirmed the vitality of the fourth category, saying (529 U.S. at 532-533, 120 S.Ct. at 1632-1633, 146 L.Ed.2d at 594):

> A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof.... In each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption; by threatening such severe punishment

> so as to induce a plea to a lesser offense or a lower sentence; or by making it easier to meet the threshold for overcoming the presumption. Reducing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end.

Later, the Court in *Carmell* summarized (529 U.S. at 551, 120 S.Ct. at 1642, 146 L.Ed.2d at 606):

> As for what *Calder* says, the fourth category applies to '[e]very law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.' 3 Dall., at 390, 1 L.Ed. 648 (emphasis deleted). The last six words are crucial. The relevant question is whether the law affects the quantum of evidence required *to convict* ....

(Emphasis in original).

The Supreme Court reiterated that the fourth category of *Calder v. Bull* relates to "whether [prosecutors] have introduced a quantum of evidence sufficient to convict the offender." 529 U.S. at 551-552, 120 S.Ct. at 1643, 146 L.Ed.2d at 606.

In our view, *Carmell v. Texas* neither overrules *Booth v. State*, *supra*, 327 Md. at 168-176, 608 A.2d at 174-178, nor renders the fourth category of *Calder v. Bull* applicable to Ch. 296 of the Acts of 1983. The fourth category of *Calder v. Bull* and the holding of *Carmell* relate to changes in rules of evidence to facilitate a *conviction*. Such changes lessen the prosecution's burden of proof. As discussed in Part III A of this opinion, the change brought about by Ch. 296 did not affect the *evidence* to establish the existence of a mitigating circumstance, did not affect the *weight* to be given a mitigating circumstance, and did not alter the evidentiary burden of proof to establish any *fact*. As earlier pointed out, Ch. 296 changed nothing with regard to the existence of or **[*313]** weight to be given a mitigating circumstance.

The only modification brought about by Ch. 296 concerned a *judgment* as to whether a particular circumstance should be regarded as mitigating. Instead of the Legislature indicating its judgment that intoxication should be deemed mitigating, Ch. 296 provided that each juror should make that judgment. In the final analysis, however, there was no significant change regarding that judgment. Both before and after the enactment of Ch. 296, the judgment as to how much *weight* should be given the factor of intoxication belonged to the jurors.

Ch. 296 of the Acts of 1983 was not a "law that alters the *legal* rules of evidence, and receives less ... testimony, than the law required at the time of the commission of the offence, *in order* to [decide against] *the offender*." *Calder v. Bull*, 3 Dall. at 390, 1 L.Ed. at 650. Consequently, the application of Ch. 296 to Evans's 1992 sentencing hearing did not violate the *ex post facto* prohibition.

*ORDERS OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED.*

## APPENDIX B

COURT OF APPEALS OF MARYLAND

VERNON EVANS, JR.

*v.*

STATE OF MARYLAND

No. 78

Sept. Term 2003

**ORDER**

The Court having considered the Appellant's Motion for Reconsideration filed in the above-captioned case, it is this 10th day of September, 2004,

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, DENIED.

/s/ ROBERT M. BELL
Chief Judge

## APPENDIX C

CIRCUIT COURT FOR BALTIMORE COUNTY

STATE OF MARYLAND

*v.*

VERNON EVANS, JR.

No. 83CR2339

* * * * * * * * * * * * * *

### MEMORANDUM OPINION AND ORDER

This matter comes before the Court on Petitioner's Motion to Correct Illegal Sentence pursuant to Md. Rule 4-345.

### FACTS

Defendant, Vernon Evans, Jr. ("Evans"), was charged with two, murders that occurred in April, 1983. On May 8, 1984, Evans was convicted of both murders and was sentenced to death. In 1991, Evans was granted a new sentencing proceeding and he was re-sentenced on November 5, 1992 before the undersigned and a jury. This Court applied the post–July 1, 1983 death penalty statute and gave the following instruction with regard to non–statutory mitigating factors: "Your determination as to the existence of any such [non–statutory] mitigating factor must include a finding that the circumstance exists in this case **and that the circumstance is, in fact, mitigating.**" (Transcript of Proceedings, 11/5/92, p. 27) (emphasis added).

The jury unanimously found that the State proved beyond a reasonable doubt that an aggravating circumstance existed—namely, that Evans "committed the murder pursuant to an agreement or contract for remuneration or the promise or remuneration to commit the murder." *See* Art. 27 § 413(d)(6). The jury also noted that one or more of them,

but fewer than 12, found by a preponderance of evidence that a non–enumerated mitigating factor of "drug influence and deterioration" existed. *See* Art. 27 § 413(g). The jury then concluded that the State proved by a preponderance of the evidence that the aggravating circumstance outweighed the mitigating circumstance and Evans was sentenced to death. *See* Art. 27 § 413(h).

Prior to July 1, 1983, Maryland's death penalty statute included intoxication in the list of mitigating factors in Art. 27 § 413(g). As of July 1, 1983, the Maryland General Assembly amended this section and removed intoxication from the list. In the preamble to the statute, the General Assembly indicated that intoxication "must be allowed and considered as a factor in mitigation," however, it removed intoxication from the enumerated list "so as to appear more as justification than as one of the many factors that may be considered as possible mitigation." *Booth v. State*, 327 Md. 142, 177, 608 A.2d 162, 173 (1992) (citing Preamble to Art. 27 § 413).

In *Foster v. State*, the Court of Appeals of Maryland held that any non-enumerated mitigating factor under subsection (g)(8) requires the jury to decide two issues: 1) did the alleged circumstance exist in the case?; and 2) is it mitigating? 304 Md. 439, 482, 499 A.2d 1236, 1258 (1985). As for the enumerated mitigating factors, "Legislature has, as a matter of law, deemed them to be mitigating. As to them, the only issue to be decided by the jury.... is whether one or more of the circumstances existed in the case." *Id.* Therefore, finding that a non-enumerated mitigating factor exists is not automatic; the jury is also required to find that the factor is mitigating.

Evans argues that the application of the new death–penalty statute at his resentencing hearing effectively violates the prohibition against *ex post facto* laws. According to Evans, the State's burden of proof is lowered by increasing the burden placed on him to prove that drug influence was a mitigating circumstance. *See Booth-El v. Nuth*, 140 F.Supp. 2d 495 (D. Md. 2001). Evans also asserts that his sentence is

illegal because his death sentence is a greater sentence than the maximum allowed by the findings of the jury, which would permit only a life sentence. In support, Evans cites *Moosavi v. State*, 355 Md. 651, 736 A.2d 285 (1999) and *Campbell v. State*, 325Md. 488, 601 A.2d 667 (.1992), which hold that "where a defendant has been charged and convicted under an entirely inapplicable statute" the resulting sentence "is an illegal sentence which may be challenged at any time." *Moosavi*, 355 Md. at 662, 736 A.2d at 291.

The State argues that Evans's Motion to Correct an Illegal Sentence is improper because Evans's sentence was not "illegal." Specifically, Evans's sentence was not in excess of the maximum allowed by law, multiple terms were not imposed for the same sentence, nor was the sentence itself invalid.

## DISCUSSION

**Does an improper jury instruction constitute an *illegal sentence* for purposes of Md. Rule 4-345?**

The cases of *Moosavi* and *Campbell*, cited by Evans, are easily distinguishable from the present case. These cases involve a very specific situation in which the respective defendants were charged under incorrect criminal statutes. There is no contention that Evans was incorrectly charged under the murder statute. Evans's sole contention is that an incorrect jury instruction was given. These cases cited by Evans do not support his argument that his sentence is "illegal" for purposes of Md Rule 4-345(a).

In *Campbell v. State*, the Defendant was charged and convicted under Art. 27. § 287(d) for possession of "numerous smoking pipes, adapted for administration of controlled dangerous substance under circumstances which reasonably indicate an intention to use." 325 Md. at 508-9, 601 A.2d at 677. The Court of Appeals of Maryland held that the Defendant *should* have been charged under Art. 2.7 §287A(a), which defines drug paraphernalia as "all equipment, product, and materials of any kind which are used, intended for use or designed for use in ingesting, inhaling or otherwise introduc-

ing into the human body a controlled dangerous substance." *Id.* The maximum sentence for violating §287A(a) is a $500 fine. The Defendant, however, received a sentence of four years under §287(d). The court ruled that the Defendant received an illegal sentence because he was improperly charged under an inapplicable criminal statute. *Id.*

Similarly, in *Moosavi v. State*, the Court of Appeals of Maryland determined that the Defendant was charged under the wrong statute, thus his sentence was illegal. 355 Md. 651, 663–67, 736 A.2d 285–291–93 (1999). "[W]e conclude that Moosavi was charged and convicted under the wrong statute. The plain statutory language and legislative history of Art. 27, § 151A, and Art. 27, § 9, demonstrate that § 151A does not encompass Moosavi's conduct, and that he should have been charged, if at all, under § 9." *Id.* at 663, 736 A.2d.at 291.

Other Maryland cases have addressed situations that constitute illegal sentences for purposes of Maryland Rule 4-345. Although the list is not expressly exhaustive, those situations include: 1) double jeopardy violations; 2) the imposition of-sentences not authorized by statute; and 3) the imposition of sentences for crimes in which the defendant was not convicted.

In *State v. Griffiths*, 338 Md. 485, 659 A.2d 876 (1992), the Court of Appeals held that imposing sentences for both a greater offense and a lesser–included offense runs afoul of double jeopardy protections and is an "illegal sentence." *Id.* at 497, 659 A.2d at 882. Similarly, in *Randall Book Corp. v. State*, 316 Md. 315, 558 A.2d 715 (1989), the Court of Appeals reviewed an alleged violation of the Double Jeopardy Clause of the Fifth Amendment as an "illegal sentence" within the meaning of Md. Rule 4-345. . The *Randall* court also held that a trial judge's impermissible considerations during sentencing does not render the sentence "illegal." *Id.* at 322–23, 558 A.2d at 719. "Whether the trial judge was motivated by ill-will, prejudice, or other impermissible considerations in imposing sentence will be considered on *direct appeal*." *Id.*

(citing *Teasley v. State*, 298 Md. 364, 370, 470 A.2d 337 (1984) (emphasis added)).

In *Ridgeway v. State*, 369 Md. 165, 797 A.2d 1287 (2002), the Court of Appeals held that sentencing a defendant for a crime of which he was not convicted constitutes an "illegal sentence." *Id.* at 171, 797 A.2d at 1290. In *Holmes v. State*, 362 Md. 190, 763 A.2d 737 (2000), the Court of Appeals held that absent statutory authority, a trial court may not order home detention as a condition of probation. Art. 27 §641(a)(1)(i)(2) authorizes trial courts in six counties to impose a sentence of confinement as a condition of probation. Baltimore City is not among the listed jurisdictions, therefore, ordering home detention as a condition of probation was beyond the authority of the Baltimore City trial court and was an illegal sentence. *Id.* at 194–94, 763 A.2d at 739 (relying on *Bailey v. State*, 355 Md. 287, 734 A.2d 684 (1999)). A sentence that is not permitted by statute is an illegal sentence. *Id.* at 195–96, 763 A.2d at 740.

In *Walczak v. State*, 302 Md. 422; 488 A.2d 949. (1985), the Court of Appeals held that the trial court "exceeded its statutory authorization" by sentencing the Defendant to pay restitution to a victim of a crime of which he was not convicted, thus rendering the restitution requirement illegal. *Id.* at 433, 488 A.2d at 954. "An illegal condition of probation can be challenged as an illegal sentence." *Id.* at 426, 488 A.2d at 950 (citing *Coles v. State*, 290 Md. 296, 429 A.2d 1029 (1981)).

The Supreme Court has more precisely clarified the scope of Federal Rule 35, which, like Md. Rule 4-345, permits a court to correct an illegal sentence at any time. In *Green v. U.S.*, 365 U.S. 301 (1961), the Petitioner alleged "an improper charge to the jury on Count 3." *Id.* at 306, n.3. The Court went on to say, "Rule 35 does not encompass all claims that could be made by direct appeal attacking the conviction, but rather is limited to challenges that involve the legality of the sentence itself." *Id.* In *Hill v. U.S.*, 368 U.S. 424 (1962), the Supreme Court noted, "the narrow function of Rule 35 is to permit correction at any time of an illegal *sentence*, not to

re-examine errors occurring at the trial or other proceedings prior to the imposition of sentence." *Id.* at 430. The Defendant in *Hill* was not asked whether he wanted to make a statement on his own behalf at the sentencing hearing. The Court held this the error did not render the sentence illegal. The Court explained, "[t]he sentence in this case was not illegal. The punishment meted out was not in excess of that prescribed by the relevant statutes, multiple terms were not imposed for the same offense, nor were the terms of the sentence itself legally or constitutionally invalid in any other respect." *Id.*

In the present case, Evans's death sentence is not an illegal sentence. The sentence is within the statutory authority of the court to impose. Evans received the maximum allowable penalty for first degree murder. Evans's challenge to the jury instruction given on non-mitigating factors should have been addressed by way of appeal or, post-conviction relief. Because this Court has decided that Evans's sentence is not illegal, this Court will not consider whether the jury instruction, as given, violates the *Ex Post Facto* Clause.

**RULING**

Defendant's Motion to Correct Illegal Sentence is DENIED.

/s/ Judge Christian M. Kahl

Date: 7-18-03

cc: Jeffrey B. O'Toole, Esq.
Julie Dietrich, Esq.
A. Stephen Hut, Jr., Esq.
Mark Morelli, Esq.
Julie Riewe, Esq.
Todd Zubler, Esq.
John Cox, Asst. State's Attorney
Jason League, Asst. State's Attorney

## APPENDIX D

### RELEVANT CONSTITUTIONAL CLAUSES

U.S. Constitution, Article 1, Section 10, Clause 1

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

### MARYLAND STATUTES AS OF APRIL 28, 1983 (With Changes Effected by Chapter 296 of the Acts of 1983 Shown in Redline)

ANNOTATED CODE OF MARYLAND
ARTICLE 27. CRIMES AND PUNISHMENTS.
I. CRIMES AND PUNISHMENTS
MURDER

**§ 412. Punishment for murder.**

(a) Designation of degree by court or jury. — If a person is found guilty of murder, the court or jury that determined the person's guilt shall state in the verdict whether the person is guilty of murder in the first degree or murder in the second degree.

(b) Penalty for first degree murder. — A person found guilty of murder in the first degree shall be sentenced either to death or to imprisonment for life. The sentence shall be imprisonment for life unless (1) the State notified the person in writing at least 30 days prior to trial that it intended to seek a sentence of death, and advised the person of each aggravating circumstance upon which it intended to rely, and (2) a sentence of death is imposed in accordance with § 413.

(c) Penalty for second degree murder. — A person found guilty of murder in the second degree shall be sentenced to imprisonment for not more than 30 years.

**§ 413. Sentencing procedure upon finding of guilty of first degree murder.**

(a) Separate sentencing proceeding required. — If a person is found guilty of murder in the first degree, and if the State had given the notice required under § 412 (b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial has been completed to determine whether he shall be sentenced to death or imprisonment for life.

(b) Before whom proceeding conducted. — This proceeding shall be conducted:

(1) Before the jury that determined the defendant's guilt; or

(2) Before a jury impaneled for the purpose of the proceeding if:

(i) The defendant was convicted upon a plea of guilty;

(ii) The defendant was convicted after a trial before the court sitting without a jury;

(iii) The jury that determined the defendant's guilt has been discharged by the court for good cause; or

(iv) Review of the original sentence of death by a court of competent jurisdiction has resulted in a remand for resentencing; or

(3) Before the court alone, if a jury sentencing proceeding is waived by the defendant.

(c) Evidence; argument; instructions.

(1) The following type of evidence is admissible in this proceeding:

(i) Evidence relating to any mitigating circumstance listed in subsection (g);

(ii) Evidence relating to any aggravating circumstance listed in subsection (d) of which the State had notified the defendant pursuant to § 412(b);

(iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures;

(iv) Any presentence investigation report. However, any recommendation as to sentence contained in the report is not admissible; and

(v) Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements.

(2) The State and the defendant or his counsel may present argument for or against the sentence of death.

(3) After presentation of the evidence in a proceeding before a jury, in addition to any other appropriate instructions permitted by law, the court shall instruct the jury as to the findings it must make in order to determine whether the sentence shall be death or imprisonment for life and the burden of proof applicable to these findings in accordance with subsection (f) ~~or (h)~~.

(d) Consideration of aggravating circumstances. — In determining the sentence, the court or jury, as the case may be, shall first consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer who was murdered while in the performance of his duties.

(2) The defendant committed the murder at a time when he was confined in any correctional institution.

(3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

(4) The victim was a hostage taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

(5) The victim was a child abducted in violation of § 2 of this article.

(6) The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

(7) The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

(8) At the time of the murder, the defendant was under sentence of death or imprisonment for life.

(9) The defendant committed more than one offense of murder in the first degree arising out of the same incident.

(10) The defendant committed the murder while committing or attempting to commit robbery, arson, or rape or sexual offense in the first degree.

(e) Definitions. — As used in this section, the following terms have the meanings indicated unless a contrary meaning is clearly intended from the context in which the term appears:

(1) The terms "defendant" and "person," except as those terms appear in subsection (d) (7), include only a principal in the first degree.

(2) The term "correctional institution" includes any institution for the detention or confinement of persons charged with or convicted of a crime, including Patuxent Institution, any institution for the detention or confinement of juveniles charged with or adjudicated as being delinquent, and any hospital in which the person was confined pursuant to an order of a court exercising criminal jurisdiction.

(3) The term "law enforcement officer" has the meaning given in § 727 of Article 27. However, as used in subsection (d), the term also includes (i) an officer serving in a probationary status, (ii) a parole and probation officer, and (iii) a law enforcement officer of a jurisdiction outside of Maryland.

(f) Finding that no aggravating circumstances exist. — If the court or jury does not find, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall state that conclusion in writing, and the sentence shall be imprisonment for life.

(g) Consideration of mitigating circumstances. — If the court or jury finds, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall then consider whether, based upon a preponderance of the evidence, any of the following mitigating circumstances exist:

(1) The defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

(2) The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(3) The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his con-

duct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance~~, or intoxication~~.

(5) The youthful age of the defendant at the time of the crime.

(6) The act of the defendant was not the sole proximate cause of the victim's death.

(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case.

(h) Weighing mitigating and aggravating circumstances.

(1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.

(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.

(3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life.

(i) Determination to be written and unanimous. — The determination of the court or jury shall be in writing, and, if a jury, shall be unanimous and shall be signed by the foreman.

(j) Statements required in determination. — The determination of the court or jury shall state, specifically:

(1) Which, if any, aggravating circumstances it finds to exist;

(2) Which, if any, mitigating circumstances it finds to exist;

(3) Whether any mitigating circumstances found under subsection (g) outweigh the aggravating circumstances found under subsection (d);

(4) Whether the aggravating circumstances found under subsection (d) are not outweighed by mitigating circumstances under subsection (g); and

(5) The sentence, determined in accordance with subsection (f) or (h).

(k) Imposition of sentence.

(1) The court shall impose the sentence determined by the jury under subsection (f) or (h).

(2) If the jury, within a reasonable time, is not able to agree as to sentence, the court shall dismiss the jury and impose a sentence of imprisonment for life.

(3) If the sentencing proceeding is conducted before a court without a jury, the court shall impose the sentence determined under subsection (f) or (h).

(l) Rules of procedure. — The Court of Appeals may adopt rules of procedure to govern the conduct of a sentencing proceeding conducted pursuant to this section, including any forms to be used by the court or jury in making its written findings and determinations of sentence.

## APPENDIX E

### Maryland Rules of Court

### Rule 4-345. Sentencing—Revisory Power of Court

(a) Illegal Sentence. The court may correct an illegal sentence at any time.

(b) Modification or Reduction—Time For. The court has revisory power and control over a sentence upon a motion filed within 90 days after its imposition (1) in the District Court, if an appeal has not been perfected, and (2) in a circuit court, whether or not an appeal has been filed. Thereafter, the court has revisory power and control over the sentence in case of fraud, mistake, or irregularity, or as provided in section (e) of this Rule. The court may not increase a sentence after the sentence has been imposed, except that it may correct an evident mistake in the announcement of a sentence if the correction is made on the record before the defendant leaves the courtroom following the sentencing proceeding.

**APPENDIX F**

IN THE CIRCUIT COURT FOR
BALTIMORE COUNTY, MARYLAND

No. 83-CR-2339

STATE OF MARYLAND

vs.

VERNON EVANS, JR.
Defendant

**REPORTER'S OFFICIAL TRANSCRIPT**
**OF PROCEEDINGS**
**(Proceedings)**
**(Afternoon Session)**
October 29, 1992
Towson, Maryland

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**[35]**

* * * * *

[MS. CHESTER:]

On the contrary, you will hear his mother say that he has written to her and said to her, mom, don't blame **[36]** yourself. In fact, Vernon Evans you will find led a life so far into what his parents wanted for him, that he hid it from them. Even in the early years when they saw it coming they couldn't get a grip on it and change it. Then he hid it from

them and he has always separated his family from what he has done wrong. He has never blamed them.

So, what you're going to see is a family not unlike families you're going to know, families in the '60's when these drugs came in and one of their kids went bad. When Vernon Evans got into drugs, ladies and gentlemen, he didn't wade into the pool; he dove into the pool.

You're going to hear and see and hear evidence about this extensive drug use that actually began with an overdose at the age of ten on some kind of downers. His mother is a nurse and she still can't even tell you what they were. So, he started for whatever reason to turn to drugs and I think you are all going to form some conclusions about why that may have happened, but regardless it happened.

So, let's talk about some more mitigation. Well, it is somewhat mitigating when somebody is not really completely themselves. Anyone that knows anything about drugs knows that drugs do things to people and it has them do things that they shouldn't do or wouldn't do or whatever. Drugs were the story of Vernon Evans life from approximately really rolling from fourteen, fifteen until he went to prison on this [37] case. Vernon Evans has never been clean of drugs in all that period of time.

I will tell you that it is that as much as anything that brought him into this horrible world and the grasp and clutches of the true monster of this case, Anthony Grandison, and literally put him in the clutches of someone who is that manipulative and able to do what he did. So, there is mitigation there. Mitigation is anything that you find that you believe in that says to you death is not necessary.

Vernon Evans is serving a sentence right now that nobody is going to touch, that isn't going to go away of life plus ten years, another sentence of twenty years added on to that. So, we're up to life plus thirty, and another life sentence on that. In this case he can receive or will receive two more life sentences or the death penalty.

There is ample punishment here; ample, harsh, very, very severe punishment available to you in this case. You can give life in this case and go home and walk out that door and know that you have stood for justice and punishment of Vernon Evans and no one can tell you you haven't. Don't let anyone bully you or coerce you or in any way make you think that is not punishment, ladies and gentlemen, because it is. That is mitigation, because that is another reason that you don't have to take that giant step – and it is a giant step – a vote for death.

**[38]** You know, this is an incredibly weighty decision. You went through the voir dire, and the judge thanked you and I'm sure Mr. Cox did and you took an oath. Let me talk to you a little bit about that.

In your questions and answers again I think you had some preconceived notions about what we were talking about and now you don't. Let me explain something to you that I think is extremely important and we thought when we picked you people, we really did, it may not have looked like at it times but it was. You believe me that there was a night spent going over a lot of information. So, you were carefully chosen.

But, you see, I remember a interesting response. I don't believe it was from any of you because the person was not selected. You know, I think I can be fair, what I think is fair. This is one time in your life when fairness cannot be subjective. You see, you can't go into it as absolutely sincere as you are, and I do not doubt your sincerity and say I'm fair, in my mind that's fire, in my mind I can consider other things, because if you are coming in and you may not even be aware of it, you see what you are doing is you are coming in with a preconceived notion or a bias that you may not even be aware you have.

* * * * *

IN THE CIRCUIT COURT FOR
BALTIMORE COUNTY, MARYLAND

No. 83-CR-2339

STATE OF MARYLAND

vs.

VERNON EVANS, JR.
Defendant

**REPORTER'S OFFICIAL TRANSCRIPT**
**OF PROCEEDINGS**
**Trial on the Merits**
**Vol. 5 of 8**
October 30, 1992
Towson, Maryland

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**[43]**

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CROSS EXAMINATION

MS. CHESTER:

Q Miss Sparrow, you have testified before in this matter, have you not?

A Yes, I have.

Q And you have given at least eight or nine statements to the Federal Bureau of Investigation about this matter, have you not?

A Yes, I have.

Q And you have given at least eight or nine statements to the Federal Bureau of Investigation about this matter, have you not?

A Yes, I have.

Q You have testified in Federal Court about this?

A Yes, I did.

Q You have testified in State Court about this?

A Yes.

Q You have testified against Vernon Evans?

A Yes, I have.

Q You testified against Janet Moore?

A Yes.

Q You have testified against Rodney Kelly?

A Yes.

Q And you have testified against one Anthony Grandison?

A Right.

[44]

Q Is that correct?

A Right.

Q And not once in all those times did you ever tell anyone that that man threatened your life?

A They never asked.

Q So you mean to tell me that nine years later, after talking with Mr. League and Mr. Cox, but refusing to talk to me, that you for the first time want a jury to believe that he treatened you?

A Yes.

Q You want them to believe that?

A Um-hum.

Q You wanted the FBI to believe the first statement you gave them, didn't you?

A Yes.

• You wanted them to believe the second one you gave them, right?

A Yes.

• And the third, right?

A Um-hum.

Q And the fourth and the fifth and the sixth and the seventh and every trial you have been in, you wanted the people to believe you, right?

A Yes.

Q Let's talk about what the jury can believe.

[45]

MR. COX: Objection to her comment.

THE COURT: Let's have a question. Sustain the objection.

Q Let's talk about what really happened, Miss Sparrow. Miss Sparrow, you met this man in 1981, right?

A Um-hum.

Q And you met him when you were down at a prison visiting people, correct?

A Yes.

Q He worked in the visiting room down at the Jessup pre-release unit, didn't he?

A Yes.

Q He tried to help people with their families and set up and make sure that visits went well, didn't he?

A Yes.

Q He was in a position where he wasn't threatening anybody; in fact they had him out with the general public, is that correct?

A Yes.

Q You struck up a conversation with him, did you not?

A Yes.

Q He really cared for you, did he not?

A Yes.

Q He really cared for you because when he got out [46] you went to the trouble of finding a place for him to live?

A Right.

Q You thought that much of him?

THE COURT: Miss Chester, would you kindly go back to the trial table unless you have some reason to approach the witness.

Q You thought that much of him, correct?

A Yes, I did.

Q All right. So when he came out you saw each other on almost a daily basis, did you not, Ma'am?

A Yes.

Q And during that course of that time he was seeing a drug counselor, was he not?

A Yes.

Q And you were having more and more problems with your drugs, isn't that true?

A No, I wasn't using drugs at the time.

Q You weren't using drugs at that time?

A No.

Q In the course of your relationship you did start to use drugs?

A Yes, I did.

Q And in the course of you using drugs Mr. Evans fell back and started to use drugs too, is that correct?

A Right.

[47]

Q I'm not saying that is your fault. He did it himself. He put the needles in his own arm, is that correct?.

A Yes.

Q You put the needles in your own arm, didn't you?

A No, I didn't.

Q How did you use drugs?

A Vernon always injected my drugs.

Q Did you ask him to do that?

A No. I could never do it. I tried and I couldn't do it.

Q But you wanted him to do it because you wanted drugs? You told this jury you were an addict, is that correct?

A Yes.

Q You were an addict through the time that this horrible thing happened, were you not?

A Yes, I was.

Q In fact, on April 26th when you got the money from Rodney Kelly, one of the first things you did was buy drugs, or he bought drugs and brought them to you, is that correct?

A I don't recall.

Q Did you use drugs on the Tuesday before this happened?

[48]

A Yes, we did.

Q Did you use drugs on the Wednesday night before this happened?

A Yes, we did.

Q And did you use drugs on the Thursday night after this happened?

A The Thursday, the same day?

Q Yes, ma'am.

A Yes, we did.

Q And did you use drugs on Friday?

A I don't know. We probably did. Didn't really go a day without.

Q How long had it been that you and Vernon hadn't gone a day without drugs, Miss Sparrow, how long had it been?

A I'm not real sure of the question.

Q Had it been weeks?

A No. Like I said, we never went a day without it.

Q I'm sorry if I don't express myself clearly. From the time that you started to use drugs yourself and you saw Vernon going back into drugs to the time this happened, Ma'am, how long a period was that; was it a couple of months?

A Yeah, it was months.

Q All right. In April or in late March – I'm going to ask you to try to remember this because I don't **[49]** think anyone has asked you this before – do you recall going to the Wyman Park Medical Center with Vernon where he saw his sister Gwen?

A I can't recall.

Q Do you remember going when Vernon said he wanted to get some drug treatment help?

A Yes, I remember.

Q Is it you know it happened, you just don't remember the place?

A I know it happened because we were both trying to get treatment.

Q Exactly. He wanted you to get help too, didn't he?

A Yes.

Q In fact, when he went in there he was looking for help for both of you wherever it was you went?

A Right.

Q You don't remember the precise place?

A No, I don't.

Q And do you recall ever meeting his sister Gwen?

A Yes.

Q Do you recall where you might have been when you met her?

A No.

Q Was it in her home?

[50]

A I think so. I'm not real sure.

Q Did you see her more than one time?

A Yeah.

Q Okay. Now, at one time you went to a place and you don't remember, it has been nine years, but you went to a place to get help for both of you. Were you able to get the help?

A No, we were turned away.

Q Why, do you recall that?

A They said the clinic was all full. They couldn't take any new patients.

Q Did they give you or Vernon or did you leave there with a list of places that you could try to find help?

A I don't think we did. I don't recall.

Q You can't recall. Let's go to the apartment. Tell the ladies and gentlemen of the jury how you came to live in that apartment?

A His Dad let us stay there.

Q He let you stay there?

A Yes.

Q Now, what was the apartment like; was it a big apartment; was it a small apartment?

A It was big.

Q It was big. Did it have a couple bedrooms?

A Yeah.

[51]

Q Did it cover the whole top of the bar?

A Yes, it did.

Q Did anyone else live up there?

A No.

Q So you had adecent place to live, is that correct, Ma'am?

A Yes.

Q Did you pay Vernon's Dad for that?

A I don't think we did.

Q Did you have the money to pay Vernon's Dad for that?

A We were working at the time.

Q In April were you working then?

A No.

Q In fact, Vernon was working for his Dad, was he not?

A Yes.

Q And in fact, when you first laid eyes on Janet Moore, Vernon was doing what?

A He was working for his Dad.

Q What was he precisely doing, if you recall?

A He was repairing a driveway, I think.

Q He was digging a driveway, is that correct?

A Yes.

Q The day that you met Janet Moore, what was [52] Vernon wearing, if you recall; what kind of clothing?

A I think he had like blue jeans on or something.

Q Okay. And was he actually working at his father's?

A Yes, he was.

Q And were you there with him?

A Yes, I was.

Q And his father lived on what street, if you recall?

A Coldspring Lane.

Q He had a house?

A Yes.

Q Was it a row home or single home?

A I think it was single.

Q Okay. And so, in the front was this driveway that Vernon was working on, right?

A Correct.

Q And a car pulled up. Do you recall what kind of car Janet Moore drove?

A She had a red and white Datsun.

Q Okay. Had you ever seen that woman before?

A No, I never had seen her before.

Q Had you ever heard her name before?

A No.

Q Had Vernon ever mentioned a Janet Moore to you?

[53]

A No.

Q When she came up she said is little Vernon here, isn't that what she said?

A Yes, it is.

Q So she didn't say is Shorty here or Vernon Evans, she said is little Vernon here. Now, when she did that, was Vernon Evans out there with you?

A Right, he was right besides me.

Q Would it be fair to say he was visible if you were?

A Yes.

Q So that did it appear to you that she had never met him before?

A Right.

Q To your knowledge he had never met her before that, is that correct?

A Yes.

Q So this was the first time that you and Vernon and Janet Moore had ever met each other, correct?

A Right.

Q Thank you. Now, so did she introduce herself to Vernon?

A Yeah.

Q And did she tell him that Grandison wanted to see him?

[54]

A Yes, she did.

Q Now, prior to that you indicated that you had never seen Tony Grandison?

A I had seen him at the bar one occasion, but, I mean, we never really conversated.

Q So in the two and a half years you knew Vernon, you spent a lot of time with Vernon, is that correct?

A Yes.

Q And in all of that time you had only seen Anthony Grandison one time?

A Right.

Q And you had talked to him on the phone you indicated maybe two, three times? I don't want to put a number in your mouth.

A Maybe just hello. I never talked to him.

Q But you know that he was on the phone in all of the time you were with Vernon two, three times?

A Yes.

Q Okay. Now, Vernon asked you if you wanted to go to the jail, correct?

A Yes, he did.

Q He didn't tell you to go to the jail, did he?

A No.

Q And you went with him why?

A I wanted to go.

[55]

Q You wanted to be with Vernon, right?

A Right. I didn't know who Janet Moore was.

Q But you wanted to be with Vernon, whatever, you wanted to be with him?

A Right.

Q So you went down to the jail and you waited for him and then you went to the projects, correct?

A Right.

Q Now, at that point in time had you and Vernon had drugs that day that you recall?

A No. I don't recall.

Q In fact, you and Vernon didn't have any money, is that correct?

A Right.

Q To the point that Vernon didn't have a car, correct?

A Right.

Q Did Vernon—I'm sorry, is something distracting you?

A No.

Q Vernon didn't have a car, right?

A Right.

Q And he didn't have any money?

A Right.

Q And you both had a daily heroin addiction, is [56] that correct?

A Yes.

Q Is heroin the only thing that Vernon used or did he use cocaine or anything else?

A I don't recall ever any cocaine.

Q Primarily heroin, at least when you two were together. And you then, when you left the projects Mr. Kelly, Rodney Kelly, had you ever seen him before?

A No.

Q Did he introduce himself to Vernon?

A I can't recall if he did or not.

Q Well, when you all went down to Theresa Purdie's, Rodney Kelly was not at the apartment, am I correct?

A No, he wasn't.

Q He came along at some point in time. Did Theresa say, there is Rodney?

A I can't recall.

Q You can't recall. Did it seem like Vernon and Rodney had known each other for years?

A No.

Q So Rodney Kelly had money and he gave it to Vernon, correct?

A Yes.

Q I don't mean to go over this ad nauseum but I'm [57] trying to go through and understand exactly what happened. You then get in the car with Janet Moore. So she is basically driving you around. And you try to get in the hotel and you couldn't and you went back and used some of that money to get drugs, I assume?

A I don't recall if we did or not.

Q But you clearly used drugs that night?

A I don't recall.

Q All right. When this happened you testified when Mr. Cox asked you the questions that Rodney Kelly pulled up in front of McDonald's. Did Vernon get in the car at McDonald's then and that is when he told you if I'm not back in a half hour to leave?

A Yes.

Q And then the next – you did not personally see Rodney Kelly again?

A No.

Q Until you went to Mondawmin Mall?

A Right.

Q Then Vernon parked the car and you didn't see where he parked the car, and walked over to you?

A Right.

Q And didn't he in fact tell you to leave and you said no, I want to stay with you? Do you recall testifying to that or telling the FBI that on a prior occasion? I know [58] it has been a long time.

A I can't recall. I could not drive back then. I didn't know how to drive. So I couldn't leave.

Q Didn't he tell you to take a bus?

A Right, if he wasn't back in half an hour.

Q Okay. And didn't you indicate that you wanted to stay with him?

A I can't recall.

Q Okay. Where the vehicle was parked, and you pointed it out on the map, there seems to be like almost a grove of trees separating the church parking lot – you know where I'm talking about?

A Right.

Q From the parking lot in which you indicate the Olds was parked, is that correct, Ma'am?

A Right.

Q And you said the car was pointed towards Slade Avenue or towards Park Heights?

A I would say towards Slade.

Q So the back of the car, and your back, would have been to the Warren House, is that correct?

A Yes.

Q Now, could you see through that grove of trees to the Warren House?

A No.

[59]

Q So that once Vernon Evans left you in the car you could not see his precise movement; you just saw the general direction in which he went, is that correct?

A Yes.

Q Let's go back again. At that point in time you indicate he asked you if you had gotten his things from the hotel?

A Yes.

Q Did he ask you if you had gotten everything from the hotel?

A No.

Q He didn't ask you if you had gotten your things?

A No.

Q Well that morning when you all got up and went out and you indicate he asked you, whatever, to go down and look and see who was at the desk, did you do any packing up or anything?

A No.

Q You had used drugs the night before?

A Um-hum.

Q And in fact Vernon wasn't feeling real good that morning, was he?

A I don't recall. I don't think he was.

Q You don't think he was feeling really well?

[60]

A No.

Q You don't feel real good time after you use drugs? I'm sure you don't use them now, but at that point in time it is very common, is it not, that a period after the drugs wear off, if you use drugs on a regular basis, especially heroin, you get sick and it is not a good feeling, is it?

A No.

Q And it can really get you—it gets you nervous or sweaty?

A Yes.

Q And you are not at your best, to say the least, is that correct?

A Right.

Q So you weren't feeling real good and he wasn't feeling real good, correct?

A Right.

Q So then at that point in time nobody packed anything up before you went to McDonald's for Rodney Kelly to drive up?

A No.

Q Okay. When Vernon left the car you indicate he was gone for about ten, fifteen minutes? I'm trying to go back over what Mr. Cox asked you. When he came back, at that time you indicate he had the canvas bag and he had a suit [61] jacket and the items you described, is that correct?

A Yes.

Q So you saw the canvas bag then?

A Right.

Q And then when he left you again he took the canvas bag with him?

A Correct.

Q All right. Did you make any attempt, Miss Sparrow, to turn around and try to see what was going on?

A No.

Q Because you really weren't feeling good at all, were you?

A No.

Q And so, when you don't feel good, you don't really concentrate on everything; some things you remember better than others, is that correct?

A Yes.

Q So in your testimony today, some things you do remember better than others because a lot of the time that you were telling people things, ongoing through this, you were sick from not being able to get drugs or needing drugs, is that correct?

A No.

Q It is not correct that you didn't get sick any more after this?

[62]

A I went through withdrawal and after that that was it.

Q Well, daily, until you had your heroin, it a pretty rough time, isn't it?

A Yes.

Q And when you have your heroin it sort of mellows you and that is one reason you take it, am I correct?

A (Nods affirmatively.)

Q Because it just gives you a very, very relaxed, if nothing else, feeling? When you say high, it is like nothing bothers you, isn't that sort of what it is like?

Q Yes.

A So in your life when you are on heroin, you are either feeling sort of relaxed, the high that everybody describes, it is really an extreme relaxation where you don't worry about anything around you, correct?

A Yes.

Q And then when that wears off it is a very uncomfortable sickness, am I correct?

A Yes.

Q And since you had been using daily, as you have told us, all this time, this is pretty much what your daily was life was as far as the drugs were concerned, and their physical effect on you, is that correct?

A Yes.

* * * * *

IN THE CIRCUIT COURT FOR
BALTIMORE COUNTY, MARYLAND

No. 83-CR-2339

STATE OF MARYLAND

vs.

VERNON EVANS, JR.
Defendant

**REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS**
**Trial on the Merits**
**Vol. 7 of 8**
November 4, 1992
Towson, Maryland

* * * * *

**[13]**

VERNON LEE EVANS, SENIOR
a witness called to testify on behalf of the Defendant, was duly sworn and testified as follows:

THE CLERK: State your full name and current address for the record, please.

THE WITNESS: Vernon Evans, Senior, E V A N S.

DIRECT EXAMINATION

MS. CHESTER:

Q Now, Mr. Evans, I'm going to ask you to keep your voice up as much as you can so that everyone can hear you.

I hope if anyone for whatever reason doesn't hear you, they will indicate so. Thank you.

Mr. Evans, how old are you, sir?

A Sixty-four.

Q And where do you reside at this time?

A 6106 Park Heights Avenue.

Q It is my understanding that before I ask you a lot of questions you wanted to say something?

A Yes, if you will allow me to state something.

MR. COX: Objection. I don't know what—

THE COURT: I think he will have to respond to questions. Mr. Evans, I can't allow you to simply make a statement that is not responsive to a statement.

Q You had a feeling that you wanted to relay about the victims in this case, is that correct, sir?

[14]

A Yes, that's correct.

Q Would you tell me what that feeling or what your statement is?

A I wanted to direct it to the Kennedy family and to the Piechowicz family and I see Mr. Kennedy back there and I wanted to say something to him and his family about me and my family and how we feel.

Q Why don't you tell the ladies and gentlemen of the jury, Mr. Evans, about how you feel about what happened to Mr. Kennedy and the Piechowicz family?

A I wanted to say to the Kennedy family that me and my family, in which we are here and they will bear me out as they testify, that we know how you feel and we have suffered the pain along with you from day one. I was so glad this morning that I had a chance to say something to you but me and my family, we want you to know that we as a family, we have suffered the pains along with you. We want you to know that we regret what has happened, that me and my family and my son who is involved and the conflict and the suffering of your family, we want you to know that we pray

for you and your family as we pray for our family, as we prayed for our son. That as long as we live we will never forget what has happened. That it is not in our family to hold animosity as you have stated about you and your family.

I appreciate what you have said this morning. I [15] immediately relayed it to my family. They were somewhat relieved to know that you are not charging the whole family with what has happened. I was talking with my son the other day and he said that he knows how you feel about him and he believes that if it happened to one of his kids he would feel the same. With you—

Q Mr. Evans, you mentioned your family. Tell us what your family are?

A My family is seated there on the first row. Mrs. Evans and Gwen, Crystal and Linda. They are all seated here, my three daughters, and this, of course, is my son here.

Q Where do you come from originally?

A Originally come from South Carolina.

Q And what is your education, sir?

A My education is twelfth grade and a couple years of college, studying accounting.

Q When you met Mrs. Evans, the future Mrs. Evans, what were you doing for a living?

A At that time I think I was working at Westinghouse, I believe, waiting for a placement with an insurance company

Q When did you get married?

A I got married in 1949.

Q What was Mrs. Evans doing when you met her?

[16]

A She was nursing at Henryton Hospital.

Q Now, you have worked a lot of jobs in your life, haven't you, Mr. Evans?

A Yeah, the major jobs I have had, I can remember three of them.

Q Tell us what they are, sir?

A Well, as I mentioned, I was working at Westinghouse waiting for a placement with the North Carolina Mutual Life Insurance Company. From there I stayed approximately sixteen to seventeen years. Eight years as a salesman and eight years as a manager, staff manager with North Carolina Mutual.

From there I attempted to increase my income. I went from there to the bar business.

Q So you owned the place that we have all heard referred to as Vernon's Lounge?

A Yes.

Q Do you still own that, sir?

A No. I sold it three years ago.

Q I see. You had some other things that even when you were working in insurance and things, you had other businesses at the same time is my understanding, is that correct?

A Yeah, I had a fire in 1976, I think, and from there I decided to become more diversified and I bought a [17] couple of cabs. From there I bought four cabs. I—at the time my son was getting ready to come out I bought a confectionery store hoping that he would be able to come out and take over that and go in and make a living for himself. But somehow he made it to a certain point but they decided not to release him and I let my daughter run it for awhile. But it was just too tough for her and I sold it.

Q You do some volunteer work is my understanding. What is the volunteer work that you have spent a great deal of time with?

A I worked with an organization called People Helping People. I was the vice president of People Helping People. In that organization we were diversified in many things. One of the major things that we worked on was neighbor-

hood and communities that had problems with drugs and businessed that had problems with developing. We went in and helped them to decide what is best; from the neighborhood association we got in and helped with people who worked with the Police Department in trying to develop a means of, I would say, setting up a defense against drugs and crime in the neighborhood. That is primarily what we have done.

Other things that I was involved with, I don't know whether you have heard of Metro Business Savings and Loan Association. I was the president of Metro Business Loan Association for three years.

[18]

Q How long have you been with People Helping People?

A I would say about eleven years now.

Q So you were with them before this even happened, is that correct?

A Yes.

Q What lead you to want to become involved in that kind of organization?

A Because of what I could see that was happening in the streets, in the communities, and what I felt that we could do to help the communities.

Q Mr. Evans, when you and Mrs. Evans were married, who was your first child?

A My son.

Q And what was he like as a little boy?

A From day one until I would say about age thirteen, fourteen he was my dreams of a son and he fell in line with all of the other of my kids. We worked hard together. We enjoyed things together. I can't help but to remember some of the things that me and my family did with the family next door when I was living on Catherine Street. We used to go out on Sunday and Wednesdays, the day that I had off. We used get together with the family next door and we used to

go out to the ice cream parlors and sit around and talk in fellowship with the family next door. We were [19] very close.

Q What was he like with his sisters?

A He was very protective with his sisters, especially his younger sister.

Q What is her name?

A Crystal.

Q Why do you say that, sir?

A Well, he was always concerned about what was happening to her and telling her the things that she shouldn't do and he would sit on the steps and watch her and used to play with her and just protect her as a big brother.

Q When did you start to notice that things were changing with your son?

A Things started changing when my son was about thirteen. He used to sit on the steps with his sisters and I used to tell him just to stay in the block and watch his sisters. Suddenly, after that I noticed a change in him. As time went on I noticed that he was not on the steps anymore.

Me and his mother started working with him. We found, in skipping over a lot of the process that we went through in talking with him, we found that somebody up there in the streets, somebody, we don't know who, and I wished I knew today, somebody introduced him to the thing you call drugs. From that point on there was a difference in him. We worked and worked and worked. We tried to find out why. We [20] could not find the reason why. We could not find who had done this. Yet we no knew it was there, and we dealt with it as best we could.

But it was just one of those things that is happening to the families today. The power of drugs is quite destructive. But we dealt with it the best we could.

Q Were you working a lot then, Mr. Evans?

A Yes, I was working in the insurance business then and my job kept me out in the afternoon far and beyond what Mrs. Evans wanted me to stay out. But there are

things that an insurance man has to do whereas some people get off at 5 but an insurance man don't get off at 5. Sometimes his work starts at 5 and continues on until 9, 10 o'clock at night. I kept in mind that this is something I had to do to make a living for my family.

As I came home in the afternoon and my son was not there, yes, I used to sit on the steps and wonder what had happened to him and where could he be; and why would this happen to me and my family. But yet it happened. It was beyond my control.

I hope I haven't got off of your question.

Q No. Can you recall about a month before this happened your son had been working you in the bar at one point in time, is that correct?

A That's correct.

[21]

Q Did there come a time when he no longer worked for you in the bar?

A Yes. During the time my son was working for me we got along fine and I thought he was well on his way. He learned the business. But yet there was something missing in his part of progress, and I think it was that he wanted to develop to management too quick and I told him he had to work his way up. So I thought he accepted that. I could understand from conversing with him that he was disappointed. But he covered my back when I had to go places. He checked my stock in. He would remind me who he thought was stealing from me and et cetera, but because I didn't find them right then, fire them right then, he was quite disturbed.

As time went on I noticed just about the last he began to change and a long about the last he and his girlfriend, Miss Sparrow, was working in the cut-rate and I was in my office and a customer came and knocked on my door and said to me, Mr. Evans, I want you to know that the lady that is working in the cut-rate with your son is stealing from you. She said I think you should bear it out because I bought a lot

of package goods. So I immediately went out and in my process that I have to check out whether anyone is stealing is if there is a bottle sold, the receipt is placed in the place of the bottle. If there is beer sold, there is a receipt placed in the place of the beer. So I checked it [22] out and found that she did it.

I confronted her and my son and I told him that he should be in on it because she is a part of him. So I brought them into my office and I told her she could not work any longer for me. My son got quite adamant about it, he was quite disturbed. So I told him that he could no longer work either because I was charging him up with it. So that was the end of him working with me.

Q Where was Vernon living at that time?

A Vernon was living above the bar in an apartment that I provided for them.

Q So after this incident you didn't let him work in the bar anymore, is that correct?

A No, I didn't let him work in the bar anymore. I was concerned about his welfare and taking care of his girlfriend. So I created a job for him at my home. I needed a driveway. So I told him this would be good for him. If he would dig the driveway, I would have someone come in and pour the cement. So he felt that that was good for him because he needed that. So that was the things that I provided for him.

Q Did he do that job for you?

A Yes.

Q There came a time when you were either saw the news or received a telephone call from a police officer about your son's involvement in this case, is that correct, sir?

[23]

A That's correct.

Q When the police called you what did you do?

A I don't know whether it was the police or a member of my family that called me first, or whether I saw the news first. I think I received the call first. I was devastated. I

couldn't do anything but just walk around in my bedroom and cry. That is all I could do. I felt that if my son was associated with whatever happened, this was the beginning of the end of him being on the streets. This was the beginning of the end of my worrying about what would happen to him in the streets. And it went on and on and then I started contacting the members of my family.

Q When the police called to ask you for help as far as reaching your son, did you help them, sir?

A Yes. I think I told them that I can't understand how my son can be involved in this, but if he was, that I would help them to contact him, to get it cleared up and I'm sure he would explain whether he was involved or not. This I had to know.

So we worked together on it and I remember Mr. Foley, I believe, was sitting in my dining room talking with me and my son called at that time. At that time I told him that the investigators was there and they wanted to speak with him, I wanted him to speak with them so he could meet with them and get it cleared up. He spoke with them. I **[24]** don't know what happened thereafter.

Q Since your son was convicted of this it has been eight, nine years?

A Yes.

Q In the last nine years what have you noticed regarding changes in your son?

A Yes, I have noticed changes in my son. I noted for one thing that I'm happier that he is clear now of the thing that started him off and that is drugs. I know that his mind is clear and his body is clear of substance of drugs which brought him to that point.

I noticed that he is rational. He has come back to the thinking, the process of thinking of my family and the things that me and his mother tried to put in to him at the beginning, before he reached thirteen. I'm happy to know that he has a desire to work with people now. He has a desire to offer leadership to his children in which I have been trying to

do. I notice that I thought that I was the one who was directing his children, especially one or two members of his family where one has changed his mind and went back to college, but it was him. It was my son. I thought —

Q How did that make you feel, Mr. Evans, that it was your son and not you?

A That was beautiful. I felt with joy that my [25] son has become a whole man and is willing to step in and help, willing to offer what he I believe has never offered before, the guidance and direction of his children and my grandchildren, his concert with his grandchildren as I carry them out on Thursday night to talk with him and let them hear it from him that the way that he went is not the way that they should go. Not only has he reached out to help his children I find and I learn that he has the stability now to ward off the things that used to irritate him.

For an example, what I mean is I learned that he was stabbed in Marion, Illinois, I think it was fifteen, sixteen times. He did not offer any offensive moves. I thought that was good.

Q Do you know what he has been doing with his time in prison?

A Yes, I know some of the things he has done. I learned from him and from others that not only counseling with his children, he is talking to inmates. Be is talking to the inmates about the things that makes a man. I notice that—I don't know whether he knows that I know or not, but he was placed in charge of keeping people and forever reminding them about the telephone and whether they are in line next and how long to stay on the phone. I thought that was good for the jail to recommend him to do this.

Q What jail is that?

[26]

A This is in Towson where he is now. And I noted that the fellow that stabbed him, I found out from him the reason why and what was he doing connected with the fellow and he said, and I learned later by checking it out, that he

was teaching the fellow how to read. I asked him why would the fellow stab him? He said I don't know, I cannot figure it out myself. But I don't know today as to why this fellow would stab him.

Q Mr. Evans, if your son gets the death penalty how will it affect you and your family?

A I know it will affect us worse than what it has already to the point of him being involved and what has happened to the Kennedy family. I don't know whether or not that I could keep myself together to keep my family together. I don't know whether or not that I would be strong enough to counsel with one of his sons who is sitting back there now. Mr. Corley, will you stand, please. That is his son, Miss Chester. The young man who Vernon has been talking with about the future is Vernon's nephew, Eddie. I wonder if you would stand, Eddie. Thank you.

Above all I know that my son can never get off of what he has been accused of but I'm wondering if the Kennedy family and the Court and the judge, if you knew what it would be like to lose a son. I don't know whether you have any children or not, but if you have children, you would know [27] what it is like. I know Mr. Kennedy knows what it is like. I don't know how I would be able to take it. I cannot offer leadership at this age to my grandchildren and great grandchildren coming from my son. I need him here for this. I know he will never walk the streets again, but as I could best sum it up by saying I don't know how. I just don't know how I could take it. I hope and pray to God that on this day will be the turning of our lives to save my son from what you call the death penalty.

As I told you, and I just want to relate this and then I'm finished. As I told you my first job was working with Westinghouse. My job there was to build and develop sleeves for a gun barrel, a tank. That sleeve goes into the barrel of the tank and it is to project the shells as they come through. We had to work very closely with the diameter, the inside diameter of that sleeve. It was so close and I don't know whether you know about micrometers or not. They measure

diameters. But in the diameter they allow for no tolerance of outside – it is just an inside diameter of, if I can recall, a minus .002. That amount of .002 was to allow flexibility of the projection of that sleeve wherein I asked my supervisor one day, why not make it perfect? He said to me that if you make it perfect, it might not work because you got to allow tolerance on each side. So you can allow for errors of the diameter in the event the gun barrel itself is [28] not made perfect, then that will allow tolerance for it to still work on either side.

So my best illustration to you of my feeling is that in your judgment I hope that you will allow tolerance on each side of the family. The Kennedy family needs flexibility. I'm willing to give up my son to allow flexibility, but I wonder if you will allow flexibility on me and my family's side to allow for errors that whatever might have been made to arrive at this conclusion so the Kennedy family will have justification and my family will have justification by just giving up my son for life.

As long as you will leave it where I can visit him, talk to him where he can feed in and help me with his kids, that is all I ask.

MS. CHESTER: Thank you, Mr. Evans. Your witness.

THE COURT: Cross?

MR. COX: No questions.

THE COURT: Very well. You may step down, Mr. Evans.

* * * * *

[47]

[MR. KANWISHER:]

Q Now, Dr. Johnson, what did your evaluation of Mr. Evans reveal to you?

A. It showed that he has come to fit this model of the lifer that is so common. The vast majority of inmates giving life sentence adapt according to the pattern I have described to you and the evidence indicates that Mr. Evans fits this

pattern. He has been living under two or more life sentences since sometime in 1984. So you don't even really have to predict. You can simply analyze how has he lived under what is essentially a life sentence.

A couple of things are striking. One is that he hasn't caused much trouble over the years in prison. He has been in prison under the last eight years under these life sentences and he has had a total of four rule violations which is an average of one every other year. Three of those, however, occurred in the first eighteen months and occurred at the Maryland Penitentiary.

Two things I would note. One, it is not uncommon for people to settle in to the routine and come to fully realize that they have a life sentence to serve and begin to adapt along the lines I have indicated. Second is that the infractions I think reflect the problems he has now gotten [48] beyond. Two of them that stand out if you look at the record are these: One relates to drugs and Mr. Evans has had a long-term problem with addiction which he has now shaken but was still in the throes of that addiction at the Maryland State Penitentiary. The second related to a weapon that was found in his cell. I think it is important to point out that the weapon wasn't on his person. He didn't threaten to use it, but it was in his possession in the sense that it was in his cell.

Criminologists who study prisons will tell you that if a prison is having security problems or if an inmate is still mingling with the inmates who are involved in things like drugs, some inmates will feel more insecure and feel more insecure and feel more of a need to have access to weapons. I think early on in the penitentiary Mr. Evans had not broken with his past lifestyle. He still had a desire for drugs. Still had association with people with similar desires and probably thought there might conceivably be a time when he might need a weapon. So he had a weapon in his cell.

This eighteen month period I would call a shaky start but not a terrible start because there was no overt violence

against staff or inmates, no threats of violence against staff or inmates.

After the first eighteen months, given the complexities of his case he was transferred to the Federal **[49]** Bureau of Prisons to a prison called Marion Penitentiary. It is very distinctive. Marion is the successor to Alcatraz. When Alcatraz was closed all those inmates were transferred to Marion. It is not simply a rock. It is not indiscriminate confinement. It involves a behavior modification program not unlike the Supermax program here in Baltimore where inmates are in close supervision. Twenty-three hours in the cell, an hour of exercise, very small groups, very few privileges.

Once they demonstrate progressively their ability to control themselves, to deal with the presence of inmates without getting in trouble, hey are gradually accorded more freedoms and privileges, more opportunity for school and work and ultimately, if you succeed, you end up living in a prison environment within Marion that is like any other maximum security prison.

The reason I'm telling you this is that Marion was a turning point for Mr. Evans and I think he certainly does too and the staff does as well. They have said these things as a matter of record. Marion is a truly drug free prison. Extremely well run. Security is excellent. There are no contact visits. It is one of the points of pride they have is they view themselves as a drug free prison. He had to kick his drug habit. He had to make this break. He did make it physically and also psychologically.

**[50]**

The records at Marion indicate that the staff came to view him as having made an excellent adjustment. They use the term excellent. They mention that he is low key; became progressively more mature; he dealt civilly with staff; that he never had problems with inmates; that as more opportunities were made available to him he seized them and was successful at work, successful at school.

It is striking that Mr. Evans himself says that this early period of confinement at Marion, although stressful in some ways was an important period of intraspection for him. It gave him a chance to look at himself and rediscover some of the things from his childhood, some of he positive things he had learned but unlearned later in life. He views himself as someone who had a good childhood but who lost control of it on the streets. In Marion he feels he got back in touch with some of those values and is now a better person. Certainly the officials agree with him.

The reason I stress that is when I called his case worker I asked him about this. I said, are many people excellently adjusted at Marion. He said no, Marion is full of the worst offenders in the entire federal system and it is very common for people to have acts of violence on their record. He said it was striking to him that Mr. Evans had no infractions at all at Marion. One during a transfer status [51] that was quite minor. But the striking thing was he had no infractions of any kind at Marion. This was quite unique.

Q. If I can interrupt you. How long was Mr. Evans at Marion?

A. Approximately six years. It was a long sentence at Marion. It ended eight months ago.

Q. You spoke to his counselor at Marion?

A. I spoke to his counselor just recently by telephone.

Q. You are relating his impressions of Mr. Evans?

A. Some of the text I think was written by this gentleman and I also asked him then to follow-up on some of the comments he had made.

Now, --

MR. COX: Objection.

THE COURT: To the extent that the witness is testifying as to things that were told to him by others, is that the basis?

MR. COX: Actually, no. He was starting to respond to no question.

THE COURT: Okay.

THE WITNESS: I thought I was still answering the first question. Sorry.

THE COURT: Try to respond to the questions if you will, sir.

[52]

Q. Now, Dr. Johnson, in your review of Mr. Evans's record, as any other interviews that you did, is there any evidence that Mr. Evans has helped other inmates since 1984 when he was incarcerated at the Maryland Penitentiary?

A. Yes. Now, early on at the Penitentiary, I think Mr. Evans would have described himself as sort of in a no man's land. When he first got to the Maryland Penitentiary, as I said, he was still craving drugs. He was still having problems that he brought with him from the outside. At the same time he got himself a job, got himself involved in education; began to live in a way that was defensible. He at Maryland and then later at Marion involved himself in tutoring illiterate inmates—he is quite literate—and some informal advising. This became more pronounced, I believe, at Marion, according to my interview with Mr. Evans and continues today at the Baltimore County Detention Center.

When I asked Mr. Bosman, the case manager at Marion about Mr. Evans's character, he stated something relevant to this question when he said I view—in essence he said, I view Mr. Evans as a trustworthy inmate. I put the two words together. He is not saying that Mr. Evans is rehabilitated and can walk outdoors and be a trustworthy citizen. He may or may not have such capacity. But he did say that he viewed him as a trustworthy inmate.

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IN THE CIRCUIT COURT FOR
BALTIMORE COUNTY, MARYLAND

No. 83-CR-2339

STATE OF MARYLAND

vs.

VERNON EVANS, JR.
Defendant

**REPORTER'S OFFICIAL TRANSCRIPT**
**OF PROCEEDINGS**
**Vol. VIII**
November 5, 1992
Towson, Maryland

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**[9]**

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(The jury returned to the courtroom.)

THE COURT: Good morning, ladies and gentlemen.

THE JURY: Good morning.

MS. CHESTER: Your Honor, with the permission of the Court, the Defense would rest at this point in time.

THE COURT: Very well.

The Defendant has a right of allocution, which I assume he is electing to exercise; is that correct?

MS. CHESTER: Yes, Your Honor.

Would you prefer that he do it now, before instructions?

THE COURT: Yes, I would.

MS. CHESTER: Mr. Evans?

THE DEFENDANT: Good morning.

Members of this court, you have heard a horrible story, both in heart and soul.

Some will forgive one day, but I feel it would never be forgotten. **[10]** I have caused Mr. Kennedy and Mrs. Piechowicz much pain.

It has been nine years since I have been involved in this hideous crime. My family was not to blame, for Lord knows, I have shamed them. I know this because of the tears I have seen them shed.

Members of this jury and family members of Mr. Scott Piechowicz and Ms. Kennedy, it is not hard for me to say I am truly sorry for having been that type of individual that would take two innocent lives. I say truthfully before this court, for the last seven years of my life, as an individual in prison, I have attempted to at least demonstrate that I am sorry for what I did.

I didn't just continue the lifestyle of drugs and associate myself with individuals that didn't want to excel. I rid myself of the one thing that allowed others to use me. I became drug-free. I began to profit as a human being.

I had lost everything that constituted being a human being once drugs had control of me.

When I was placed in the Marion Institution, that housed men from all over the world, it did not take me long to realize this was a place considered by most men to be dangerous even by the toughest of men.

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**[13]**

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THE COURT: Anything further from the State?

MR. COX: No, Your Honor.

THE COURT: Very well.

Members of the jury, the instructions on the law, which it now becomes my obligation to give you, are binding upon you and must be followed by you in determining the appropriate sentence.

On the other hand, any comments I may make about the facts are not binding upon you, because you are the sole judges of the facts. However, you must apply the law to the facts as you find them.

By your oath, you are sworn to determine the appropriate sentence after your determination of the facts and in accordance with the law as it is given to you. In exercising your function as judges of the facts, you are required to base your findings of facts solely upon the evidence that has been presented.

You are to consider all of the evidence, both that which is favorable to the Defendant and that which **[14]** is unfavorable to him.

The, evidence consists of the testimony of the witnesses, as well as the exhibits that have been received in evidence and any stipulations that may have been entered into between the State and the Defense.

A stipulation is the term used for an agreement made by the attorneys in the case. Stipulations are binding and conclusive on the respective parties.

When the attorneys on each side stipulate to the existence of a fact or event, that fact or event is deemed to be evidence in the case, and you should regard it as proven.

In evaluating the evidence, you should consider it in light of your own experiences. You may draw any reasonable inferences or conclusions from the evidence that you believe to be justified by common sense and your own experiences.

The following things are not evidence and you should not give them any weight or consideration: First, the opening and closing arguments of counsel; second, any inadmissi-

ble or stricken evidence; third, any questions or objections by counsel.

Inadmissible or stricken evidence must not be considered or used by you. You must disregard the questions that I did not permit the witness to answer, **[15]** and you must not speculate as to the possible answers.

If after an answer was given, I ruled the answer should be stricken, you must disregard both the question and the answer in your deliberations.

Evidence is either direct or circumstantial. Direct evidence is evidence that directly proves the fact which, by itself, if found to be true, establishes that fact.

Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may reasonably and logically be drawn from another fact or group of facts, established by the evidence.

It is not necessary that facts be proved by direct evidence. They may be proved by circumstantial evidence or by a combination of direct evidence and circumstantial evidence.

Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

Remember that the statements and arguments of counsel are not evidence. This includes opening statements and closing arguments, as well as any comments **[16]** made during the course of the sentencing procedure.

It is, of course, your recollection of the facts and your determination of the credibility of the witnesses and the weight to be given to the evidence which controls. If your recollection of any of the testimony of the witnesses differs from the recollection of any counsel or the Court, you should rely upon your own recollection of the testimony and evidence.

During the course of this proceeding, I may have commented on the evidence or questioned the witnesses. Nothing I have said or done is to be taken by you as any indication that I have any opinion with regard to the facts of this case or the believability of any of the evidence or that I favor any position of either the State or the Defense.

It is your function and your function alone to decide upon the truth of the testimony and the quality and believability of the testimony as given by the various witnesses.

In determining whether a witness should be believed, you should carefully judge all of the testimony and evidence and the circumstances under which each witness testified. This means that you should consider such factors as, one, the witness' behavior on the stand and manner of testifying; two, whether the witness **[17]** appeared to be telling the truth; three, the witness' opportunity to see or hear the thing about which testimony was given; four, the accuracy of the witness' memory; five, whether the witness has a motive not to tell the truth; six, whether the witness has an interest in the outcome of the case; seven, whether the witness' testimony was consistent, and eight, whether the witness' testimony was supported or contradicted by other evidence that you believe.

After making an assessment of the credibility of witnesses, you may believe all, part or none of the testimony of any witness. Remember that the weight of the evidence is not necessarily determined by the number of witnesses called by either side.

You may find that a smaller number of witnesses on one side presents more credible evidence than the testimony of a greater number of witnesses on the other side.

A witness, who has special training or experience in a given field, is permitted to express opinions based upon observed or assumed facts, to aid you in deciding the issues of this case.

In weighing the opinion of such an expert witness, you should consider the expert's experience, training and skills,

as well as the expert's knowledge of [18] the subject matter about which the expert has expressed an opinion.

You should give the testimony the weight and value you believe it should have. You are not required to accept any expert's opinion, and you should consider an expert's opinion together with all of the other evidence.

In short, you may accept all, part or none of the testimony of any expert witness.

Now, the Defendant has an absolute constitutional right not to testify. The fact that the Defendant did not testify in these proceedings must not be held against the Defendant. It must not be considered by you in any way or even discussed by you.

In a sentencing proceeding such as this, a Defendant has the right of allocution, which means he may address you and make a statement.

During allocution, the Defendant is not under oath and thus not subject to the penalties of perjury or to cross-examination. The Defendant's allocution is evidence, and you should give it the weight and credibility you believe it deserves. You should not disregard his statements in allocution merely because they are not sworn testimony.

When you retire to deliberate, you will take [19] with you two forms, which are titled: Findings and Sentencing Determination, which you will be required to use in making your findings and determining the appropriate sentences.

Your completion of these forms will constitute your verdict. The original of these forms must be signed by each one of you after you have made appropriate findings and agreed upon sentencing verdicts.

I will provide you with a copy of these verdict forms at this time, Ms. Romett, so that each of you may review them while you are listening to these instructions, and so that you may also have them during the course of your deliberations for your reference.

The originals are marked with the word original and will be the official copy on which you will record your verdicts

and which each of you will sign. Your Forelady should have these original copies.

Although the verdict forms contain spaces for answers to be checked off, it is important that you remember that you are engaged in more than a mere counting of aggravating and mitigating circumstances. You must weigh aggravating and mitigating circumstances in terms of their substantiality and persuasiveness and not merely in terms of their relative **[20]** number.

It is your duty to weigh each of the factors, both aggravating and mitigating, to determine whether the sentences shall be life imprisonment or death. Similarly, these forms should not be viewed as a simple type of check list, which leads you directly to a finding and verdict, without further consideration.

It will be the duty of each of you, as jurors, to weigh the facts and to consider the aggravating and mitigating circumstances in determining the sentence. Keep in mind that your ultimate determinations, as to a life sentence or the death sentence in the case, will not be given as a recommendation to the Court but will in fact be the sentence that will be imposed.

As I told you before, the Defendant has been previously found guilty of the first degree premeditated murder of David Scott Piechowicz and Susan Kennedy, and those convictions are binding upon you.

Looking at the form for your Findings and Sentencing Determination, you will notice that your first task is to determine whether there are unanimous findings that the State has proven, beyond a reasonable doubt, that the Defendant was a first degree principal to each of the murders.

**[21]**

A first degree principal is one who actually commits the murder by his own hand. Even though the Defendant has previously been found to be guilty of first degree murder, at this sentencing hearing, he is entitled to a separate determination as to whether or not he is a first degree principal.

Now, you are not to consider any evidence of prior criminal acts of the Defendant in making this determination, nor are you to consider any aggravating or mitigating evidence for this purpose.

I instructed you that section one of each sentencing form requires the State to prove, beyond a reasonable doubt, that the Defendant was a principal in the first degree to that particular murder.

A reasonable doubt is defined in the law as such doubt as would cause a reasonable person to hesitate to act in the graver or more important transactions of one's own life.

Proof beyond a reasonable doubt does not mean proof beyond any doubt or proof to a mathematical certainty, but it does require such proof as would convince you of the truth of a fact to the extent that you would be willing to act upon such a belief in an important matter, affecting your own business or personal affairs.

[22]

If you unanimously find that the State has not proven beyond a reasonable doubt that the Defendant was a principal in the first degree, then you must check not proven as to that evidence in section one.

You must also consider the second finding in section one and determine whether the State has proven it, and I suggest to you that it has not.

If you find neither has been proved, then you must proceed directly to section five and state that conclusion in writing, by filling in "life imprisonment" in the space at the end of section five.

If you unanimously find, beyond a reasonable doubt, that the Defendant was a principal in the first degree, that is that Vernon Evans was the person who actually caused the deaths of David Scott Piechowicz and Susan Kennedy, then you must check proven under that finding in section one. If you find either or both of the statements in section one to be proven, then you must proceed to section two.

The second portion of your deliberation process involves the aggravating circumstances.

In this case, there are two aggravating circumstances alleged by the State in each murder. They are, one, the Defendant committed the murder pursuant to an agreement or contract for remuneration or the promise [23] of remuneration. Remuneration is payment in exchange for services.

Two, the Defendant committed more than one offense of murder in the first degree, arising out of the same incident.

The burden of proof upon the State in this portion of the process is again beyond a reasonable doubt. You must consider each of the alleged aggravating circumstances. If you unanimously find that an aggravating circumstance has been proven beyond a reasonable doubt, then check proven for that circumstance on the form.

If you unanimously find that both of the circumstances have not been proven, then go directly to section five and enter life imprisonment. If you find that one or both of the aggravating circumstances has been proven, then you must proceed to section three.

Now, you have heard testimony and have received the written statements of family members of David Scott Piechowicz and Susan Kennedy. This testimony and these statements are known as victim impact evidence and are intended to show each victim's uniqueness as a human being and the impact on the families of their loss.

This evidence should be given whatever weight you feel it deserves. The victim impact evidence is not [24] to be considered by you in determining whether the Defendant is a principal in the first degree

You are further instructed that this evidence is not to be taken as an aggravating circumstance in your deliberations. You may consider this evidence in determining, pursuant to my instructions to you and pursuant to the verdict form, whether the sentence shall be death or life imprisonment as to each victim.

In determining whether mitigating circumstances exist under section three, you must determine whether the Defendant has proven by a preponderance of the evidence that any exist. Each one of you should individually consider each mitigating circumstance.

If you agree unanimously and by a preponderance of the evidence that a mitigating circumstance exists, you must check A, next to the corresponding mitigating circumstance under section three. If you find unanimously and by a preponderance of the evidence that the mitigating circumstance does not exist, you must check B next to the corresponding mitigating circumstance.

If, after a reasonable period of deliberation, one or more of you but fewer than all twelve find by a preponderance of the evidence that the [25] mitigating circumstance exists, you must check C next to the corresponding circumstance under section three.

Now, what constitutes a reasonable period of deliberation is a matter left to your discretion.

Preponderance of the evidence means evidence of a greater weight more convincing to you than the evidence offered in opposition to it. Stated differently, something is proven by a preponderance of the evidence, if the evidence as a whole, shows the fact to be proven, in this case the existence of a mitigating circumstance is more probable than not.

A mitigating circumstance may be proven by evidence which has emanated either from the State or the Defense or by evidence from both.

As you will note in the form in determining whether mitigating circumstances exist by a preponderance of the evidence, you must consider the mitigating circumstances that are referred to on the form, one, whether the Defendant has not previously first been found guilty of a crime of violence; second, entered a plea of guilty or nolo contendere to a charge of a crime of violence; or three, been granted proba-

tion entered on stay of entry of judgment, pursuant to a charge of a crime of violence.

Crime of violence is described on the form.

[26]

Whether the victim, David Scott Piechowicz on one form and Susan Kennedy on the other, was a participant in the Defendant's conduct or consented to the act which caused his or her death.

Three, whether the Defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

Four, whether the murder was committed while the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance.

Five, whether the Defendant was of a youthful age at the time of the crime.

Six, whether the act of the Defendant was not the sole proximate cause of the victim's death.

Seven, whether it is likely that the Defendant will engage in further criminal activity that would constitute a continuing threat to society.

Eight, here you would list any additional mitigating circumstance which you find to exist from the evidence. Any such mitigating circumstance listed here would constitute what is called a non-statutory [27] mitigating factor.

Your determination as to the existence of any such mitigating factor must include a finding that the circumstance exists in this case and that the circumstance is, in fact, mitigating.

In considering non-statutory mitigating factors, you may consider evidence–relating to the Defendant's character and background, as well as relevant and material conduct of the Defendant up to and during this sentencing proceeding.

If you perceive anything relating to the Defendant or the crime, which causes you to believe that death may not be appropriate, you may treat such factor as a mitigating circumstance, and you may decide it outweighs the aggravating factor or factors.

Your consideration of the Defendant's parole eligibility, should he receive a sentence of life imprisonment, are relevant and may be taken into account by you in the first instance in determining whether the appropriate sentence is death or life imprisonment. In other words, you may regard the Defendant's ineligibility for parole if you find it as a mitigating circumstance.

I also want to emphasize, with respect to mitigating circumstances, that each one of you should individually consider each circumstance, and you should not surrender your honest opinion as to the existence or [28] weight of a mitigating circumstance, solely because of the opinion of your fellow jurors.

If none of you find any mitigating circumstance, then go on to section five and enter death as the appropriate sentence.

You are further instructed, with regard to section three, that if you unanimously find, by a preponderance of the evidence, that one or more of the mitigating circumstances exists, or if one or more of you but fewer than twelve of you find, by a preponderance of the evidence, that one or more of the mitigating factors exist, you shall then go on to section four.

In this section, you will determine whether, by a preponderance of the evidence, the aggravating circumstance or circumstances outweighs the mitigating circumstance or circumstances.

The State carries the burden of proving that the aggravating circumstance or circumstances outweigh any mitigating circumstance or circumstances.

You must decide how persuasive the mitigating factors are when compared to the aggravating factors. You may

feel that a single mitigating circumstance is compelling enough to justify a life sentence, even if you could find more than one aggravating circumstance.

On the other hand, you may find that a single [29] aggravating circumstance, when weighed against the mitigating circumstances, is sufficient to justify a death sentence.

If you do not find, by a preponderance of the evidence, that the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances, the sentence shall be life imprisonment, or if you find that your minds are in a state of even balance as to whether the aggravating circumstances outweigh the mitigating circumstance or circumstances, the sentence must also be life imprisonment, and you must then proceed directly to section five and state that conclusion in writing by filling in life imprisonment in the space at the end of section five.

If you unanimously find that the State has proven, by a preponderance of the evidence, that the aggravating circumstance or circumstances does outweigh the mitigating circumstance or circumstances, the sentence shall be death. You must then proceed directly to section five and state that conclusion in writing by filling in death on the space at the end of section five.

As I have already indicated, your determination, which is made in writing on the findings form, to be signed by your Forelady and all of the members of the jury.

[30]

Once your deliberations have ceased and you have reached your verdict, you must each make sure that the determination and verdict, written on the findings and sentencing determination form, represents your own verdict and you will then sign your name in the, space provided at the end of the form.

During your deliberations, your Forelady shall preside and will be your spokesperson in court.

If you need to communicate with the Court, please reduce your message or question to writing, signed by your

Forelady, and pass the note to the person who will be guarding the-door, who will then promptly bring it to my attention. I will then respond as soon as possible, either in writing or by having you return to the courtroom.

With any message or question you send, never specify any numerical division that exists among the jury at that time.

I should also mention to you that any question you may have, concerning additional evidence, cannot be responded to. You have heard all of the evidence that you will hear in this case.

It is my practice to tape record my instructions, so that they will be available to the jury. I have now tape recorded everything that I have said.

[31]

Please understand, you are under no obligation to listen to these instructions again. Many people would say it is torture enough to have to listen to them once.

Nevertheless, I intend to give them to your Forelady when you retire to the jury room, so that will be available to you, should you have a question with regard to what I have said to you. When you have completed the form and thereby have agreed upon the sentencing in this case, let my court clerk know you have completed the form.

You will then be returned to the courtroom to deliver your decision in open court.

You will be asked, upon your return to the courtroom, whether you have agreed upon your verdict or sentencing determination and if you have completed the form. You will all indicate you have agreed as to the completion of the form, and your foreperson will then be asked to deliver the findings and sentencing determination to the court for the sentencing of the Defendant.

Counsel may approach regarding exceptions.

* * * * *

[64]

[MR LEAGUE:]

He is a danger, ladies and gentlemen. He is a danger because he will kill for other people's reasons.

And if that reason arises again and Shorty will benefit, make no bones about it, he will kill again, and he will hurt whoever he needs to hurt.

And Ms. Chester can jump up and down from here to eternity and that's not going to change. Dr. Johnson told you he couldn't be certain.

He is a future danger. It has not been proven that he is not a future danger, and you should check not proven.

Then we have the catch-all, ladies and gentlemen. We unanimously find, by a preponderance of the evidence, that the following additional mitigating circumstances exist. Two things must happen here, ladies and gentlemen. One, you must find from the evidence that it exists, and two, you must find that it is mitigating.

And what are the two areas here Ms. Chester would have you believe mitigate what he has done? Well, the first is drugs.

[65]

Yes, he is and was a heroin addict, and there was no contest there, but that doesn't make people kill.

And when he was released after serving his term, released on parole for possession with intent to distribute heroin, as a condition, of that parole, he was ordered into drug treatment, and he went into drug treatment, and you heard the Defense's own witness say so. In the spring of '83, he was being treated for drugs.

And you heard their witness say what you need for successful treatment, a good counselor. Well, he said he was a good counselor, and we have no reason to disagree with that.

Support from your family, Shorty had that. What he did, ladies and gentlemen, was to decide on his own to stop, but what is most important here is he could have gone back.

The counselor said the door was open, and if they needed to re–evaluate his treatment program, they would do that, and if he needed to be referred to methadone treatment, they could do that, too, and that relieves the symptoms of a heroin addiction, but he didn't do that.

He didn't want that at all.

Does that mitigate what he has done at all?

**[66]**

No. It makes it worse, because the treatment was available to him. It was always available to him, and it has no reason, no tie to why he killed Susan Kennedy and why he killed Scott Piechowicz, because that was strictly business. That was a contract to kill, and the gain there was $9,000 $9,000 cash money.

And then the second, and this, ladies and gentlemen, quite frankly, I find absolutely repugnant. Sally Chester stands up here and says it's a mitigator that he doesn't blame his family for what happened.

Well, that's like the State's evidence that he is a principal in the first degree. He can't blame his family any more than he can contest what he did, and he gains no favor by saying that.

He had a good family. He had a good upbringing, but what he has done is even an affront to them. He disregarded everything he was ever taught.

He chose his route. He chose how he wanted to live his life, and it is he that is responsible for that choice, and it doesn't mitigate not to blame his family. It makes it worse.

But also, understand this, ladies and gentlemen. There was no dispute that he comes from a good family. That is not something you should consider in determining the appropriate sentence.

* * * * *

**APPENDIX G**

IN THE CIRCUIT COURT FOR
BALTIMORE COUNTY, MARYLAND

No. 83-CR-2339

STATE OF MARYLAND

vs.

VERNON EVANS, JR.
Defendant

**FINDINGS AND SENTENCING DETERMINATION**

**Section I**

Based upon the evidence, we unanimously find that each of the following statements marked "proven" has been proven BEYOND A REASONABLE DOUBT and that each of those statements marked "not proven" has not been proven BEYOND A REASONABLE DOUBT.

1. The Defendant was a principal in the first degree to the murder of David Scott Piechowicz.

| ✓ | |
|---|---|
| proven | not proven |

2. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

| | ✓ |
|---|---|
| proven | not proven |

(If one or both of the above are marked "proven", proceed to Section II. If both are marked "not proven", proceed to Section V and enter "Life Imprisonment".)

**Section II**

Based upon the evidence, we unanimously find that each of the following aggravating circumstances that is marked "proven" has been proven BEYOND A REASONABLE DOUBT and we unanimously find that each of the aggravating circumstances marked "not proven" has not been proven BEYOND A REASONABLE DOUBT.

1. The Defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

| ✓ | |
|---|---|
| proven | not proven |

2. The Defendant committed more than one offense of murder in the first degree arising out of the same incident.

| ✓ | |
|---|---|
| proven | not proven |

(If one or more of the above are marked "proven", complete Section III. If all of the above are marked "not proven", do not complete Sections III and IV and proceed to Section V and enter "Life Imprisonment".)

**Section III**

Based upon the evidence, we make the following determinations as to mitigating circumstances:

1. The Defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) been granted probation on stay of entry of judgment pursuant to a charge of a crime of violence.

(As used in the preceding paragraph, "crime of violence" means abduction, arson, escape, kidnapping, mayhem, murder, robbery, rape in the first or second degree, sexual offense in the first or second degree, manslaughter other than involuntary manslaughter, an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.)

(Mark only one)

_____ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

__✓__ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

_____ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

2. The victim was a participant in the Defendant's conduct or consented to the act which caused the victim's death.

(Mark only one)

_____ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

__✓__ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

_____ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

3. The Defendant acted under substantial duress, domination, or provocation of another person, even though not so substantial as to constitute a complete defense to the prosecution.

(Mark only one)

_____ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

__✓__ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

_____ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

4. The murder was committed while the capacity of the Defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

(Mark only one)

_____ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

__✓__ (b) We unanimously find by a preponderance of the eivdence that the above circumstance does not exist.

_____ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

5. The Defendant was of a youthful age at the time of the crime.

(Mark only one)

_____ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

__✓__ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

_____ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

6. The act of the Defendant was not the sole proximate cause of the victim's death.

(Mark only one)

_____ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

__✓__ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

_____ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

7. It is unlikely that the Defendant will engage in further criminal activity that would constitute a continuing threat to society.

(Mark only one)

_____ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

__✓__ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

_____ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

8. (a) We unanimously find by a preponderance of the evidence that the following additional mitigating circumstances exist:

_____
_____
_____
_____

(Use reverse side if necessary).

(b) One or more of us, but fewer than all 12, find by a preponderance of the evidence that the following additional mitigating circumstances exist:

Drug influence and Deterioration_____
_____
_____
_____

(Use reverse side if necessary).

(If the jury unanimously determines in Section III that no mitigating circumstances exist, do not complete Section IV. Proceed to Section V and enter "Death". If the jury or any juror determines that one or more mitigating circumstances exist, complete Section IV.)

**Section IV**

Each individual juror shall weigh the aggravating circumstances found unanimously to exist against any mitigating circumstances found unanimously to exist, as well as against an mitigating circumstance found by that individual juror to exist.

We unanimously find that the State has proven by A PREPONDERANCE OF THE EVIDENCE that the aggravating circumstance: marked "proven" in Section II outweigh the mitigating circumstances in Section III.

| ✓ | |
|---|---|
| yes | no |

**Section V**

Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instructions:

1. If both answers in Section I are marked "not proven", enter "Life Imprisonment".

2. If all of the answers in Section II are marked "not proven", enter "Life Imprisonment".

3. If Section III was completed and the jury unanimously determined that no mitigating circumstance exists, enter "Death".

4. If Section IV was completed and marked "no", enter "Life Imprisonment".

5. If Section IV was completed and marked "yes", enter "Death".

We unanimously determine the sentence to be Death.

/s/
Foreperson

/s/
Juror 2

/s/
Juror 3

/s/
Juror 4

/s/
Juror 5

/s/
Juror 6

/s/
Juror 7

/s/
Juror 8

/s/
Juror 9

/s/
Juror 10

/s/
Juror 11

/s/
Juror 12

**APPENDIX H**

IN THE CIRCUIT COURT FOR
BALTIMORE COUNTY, MARYLAND

No. 83-CR-2339

STATE OF MARYLAND

vs.

VERNON EVANS, JR.
Defendant

**FINDINGS AND SENTENCING DETERMINATION**
**Section I**

Based upon the evidence, we unanimously find that each of the following statements marked "proven" has been proven BEYOND A REASONABLE DOUBT and that each of those statements marked "not proven" has not been proven BEYOND A REASONABLE DOUBT.

1. The Defendant was a principal in the first degree to the murder of Susan Kennedy.

| proven | not proven |
|---|---|
| ✓ | |

2. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise off remuneration.

| proven | not proven |
|---|---|
| | ✓ |

(If one or both of the above are marked "proven", proceed to Section II. If both are marked "not proven", proceed to Section V and enter "Life Imprisonment".)

**Section II**

Based upon the evidence, we unanimously find that each of the following aggravating circumstances that is marked "proven" has been proven BEYOND A REASONABLE DOUBT and we unanimously find that each of the aggravating circumstances marked "not proven" has not been proven BEYOND A REASONABLE DOUBT.

1. The Defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

| ✓ | |
|---|---|
| proven | not proven |

2. The Defendant committed more than one offense of murder in the first degree arising out of the same incident

| ✓ | |
|---|---|
| proven | not proven |

(If one or more of the above are marked "proven", complete Section III. If all of the above are marked "not proven", do not complete Sections III and IV and proceed to Section V and enter "Life Imprisonment".)

**Section III**

Based upon the evidence, we make the following determinations as to mitigating circumstances:

1. The Defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) been granted probation on stay of entry of judgment pursuant to a charge of a crime of violence.

(As used in the preceding paragraph, "crime of violence" means abduction, arson, escape, kidnapping, mayhem, murder, robbery, rape in the first or second degree, sexual offense in the first or second degree, manslaughter other than involuntary manslaughter, an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.)

(Mark only one)

_____ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

__✓__ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

_____ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

2. The victim was a participant in the Defendant's conduct or consented to the act which caused the victim's death.

(Mark only one)

_____ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

__✓__ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

_____(c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

3. The Defendant acted under substantial duress, domination, or provocation of another person, even though not so substantial as to constitute a complete defense to the prosecution.

(Mark only one)

_____ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

__✓__ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

_____(c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

4. The murder was committed while the capacity of the Defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

(Mark only one)

_____ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

__✓__ (b) We unanimously find by a preponderance of the eivdence that the above circumstance does not exist.

_____(c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

5. The Defendant was of a youthful age at the time of the crime.

(Mark only one)

_____ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

__✓__ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

_____(c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

6. The act of the Defendant was not the sole proximate cause of the victim's death.

(Mark only one)

_____ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

__✓__ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

_____(c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

7. It is unlikely that the Defendant will engage in further criminal activity that would constitute a continuing threat to society.

(Mark only one)

_____ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

___✓___ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

_____(c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

8. (a) We unanimously find by a preponderance of the evidence that the following additional mitigating circumstances exist:

_____

_____

_____

_____

(Use reverse side if necessary).

(b) One or more of us, but fewer than all 12, find by a preponderance of the evidence that the following additional mitigating circumstances exist:

Drug influence and Deterioration

_____

_____

_____

(Use reverse side if necessary).

(If the jury unanimously determines in Section III that no mitigating circumstances exist, do not complete Section IV. Proceed to Section V and enter "Death". If the jury or any juror determines that one or more mitigating circumstances exist, complete Section IV.)

**Section IV**

Each individual juror shall weigh the aggravating circumstances found unanimously to exist against any mitigating circumstances found unanimously to exist, as well as against any mitigating circumstance found by that individual juror to exist.

We unanimously find that the State has proven by A PREPONDERANCE OF THE EVIDENCE that the aggravating circumstances marked "proven" in Section II outweigh the mitigating circumstances in Section III.

| ✓ | |
|---|---|
| yes | no |

**Section V**

Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instructions

1. If both answers in Section I are marked "not proven", enter "Life Imprisonment".

2. If all of the answers in Section II are marked "not proven", enter "Life Imprisonment".

3. If Section III was completed and the jury unanimously determined that no mitigating circumstance exists, enter "Death"

4. If Section IV was completed and marked "no", enter "Life Imprisonment".

5. If Section IV was completed and marked "yes", enter "Death".

We unanimously determine the sentence to be Death .

| | |
|---|---|
| /s/ | /s/ |
| Foreperson | Juror 7 |
| /s/ | /s/ |
| Juror 2 | Juror 8 |
| /s/ | /s/ |
| Juror 3 | Juror 9 |
| /s/ | /s/ |
| Juror 4 | Juror 10 |
| /s/ | /s/ |
| Juror 5 | Juror 11 |

/s/
Juror 6

/s/
Juror 12

(2)

No. 04-818

Supreme Court, U.S.
FILED
JAN 18 2005
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

VERNON LEE EVANS, JR.

*Petitioner,*

v.

STATE OF MARYLAND,

*Respondent.*

**On Petition For Writ of Certiorari**
**To The Court of Appeals of Maryland**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## CAPITAL CASE
## QUESTION PRESENTED

Did the Court of Appeals of Maryland correctly conclude that there was no *ex post facto* violation in Evans's capital sentencing proceeding?

## TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

BRIEF IN OPPOSITION ..... 1

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL PROVISIONS INVOLVED ..... 1

STATEMENT OF THE CASE ..... 1

A. Procedural history ..... 1

B. Statement of Facts ..... 5

REASONS FOR DENYING THE WRIT ..... 8

THE COURT OF APPEALS OF MARYLAND CORRECTLY CONCLUDED THAT THERE WAS NO *EX POST FACTO* VIOLATION IN EVANS'S CAPITAL SENTENCING PROCEEDING. ..... 8

1. *Carmell v. Texas* Is Not Retroactive. ..... 9

2. There Has Been No *Ex Post Facto* Violation. ..... 11

CONCLUSION ..... 19

## TABLE OF AUTHORITIES

Page

**Cases:**

*Apprendi v. New Jersey*, 530 U.S. 466 (2000) . . . . . 4

*Beard v. Banks*, 124 S. Ct. 2504 (2004) . . . . . 10

*Beazell v. Ohio*, 269 U.S. 167, 46 S.Ct. 68, 68, 70 L.Ed. 216 (1925) . . . . . 12

*Booth v. Maryland*, 506 U.S. 988 (1992) . . . . . 17

*Booth v. State*, 306 Md. 172, 507 A.2d 1098 (1986) . . . . . 14

*Booth v. State*, 327 Md. 142, 608 A.2d 162, *cert. denied*, 506 U.S. 988 (1992) . . . . . 8, *passim*

*Booth-El v. Nuth*, 288 F.3d 571 (4th Cir.), *cert. denied*, 537 U.S. 959 (2002) . . . . . 16, 17

*Brady v. Maryland*, 373 U.S. 83 (1963) . . . . . 3

*Cage v. Louisiana*, 498 U.S. 39 (1990)(per curiam) . . . . . 10

*Calder v. Bull*, 3 U.S. 386 (3 Dall. 1798) . . . . . 17, 18

*Carmell v. Texas*, 529 U.S. 513 (2000) . . . . . 8, *passim*

*Caspari v. Bohlen*, 510 U.S. 383 (1994) . . . . . 10

*Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) . . . . . 12, *passim*

Page

*Dobbert v. Florida*, 432 U.S. 282,
97 S.Ct. 2290, 53 L.Ed.2d 344 (1977) ..... 13, *passim*

*Evans v. Maryland*, 478 U.S. 1010 (1986) ..... 2

*Evans v. Maryland*, 513 U.S. 833 (1994) ..... 3

*Evans v. Smith*, 54 F. Supp.2d 503 (D. Md. 1999) ..... 3

*Evans v. Smith*, 220 F.3d 306 (4th Cir. 2000) ..... 4

*Evans v. Smith*, 532 U.S. 925 (2001) ..... 4

*Evans v. State*, 301 Md. 45, 481 A.2d 1135 (1984),
*Grandison v. Maryland*, 470 U.S. 1034 (1985) ..... 2, 6

*Evans v. State*, 304 Md. 487, 499 A.2d 1261 (1985) .... 2, 6

*Evans v. State*, 333 Md. 660, 637 A.2d 117 (1994) ..... 2

*Evans v. State*, 345 Md. 524, 693 A.2d 780,
*cert. denied*, 522 U.S. 966 (1997) ..... 3

*Evans v. State*, 382 Md. 248, 855 A.2d 291 (2004) .. 1, 4, 17

*Evans v. State*, Misc. No. 10, Sept. Term, 2001 (order) ... 4

*Evans v. State*, Misc. No. 18, Sept. Term, 1999 (order) ... 3

*Evans v. Thompson*, 881 F.2d 117 (4th Cir.1989),
*cert. denied*, 497 U.S. 1010, 110 S.Ct. 3255,
111 L.Ed.2d 764 (1990) ..... 13, 14

Page

*Foster v. State*, 304 Md. 439, 499 A.2d 1236 (1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3310, 92 L.Ed.2d 723 (1986) ..... 12

*Foster, Evans, and Huffington v. State*, 305 Md. 306, 503 A.2d 1326, 1333 (1986) ..... 2

*Graham v. Collins*, 506 U.S. 461 (1993) ..... 10

*Grandison v. State*, 305 Md. 685, 506 A.2d 580, *cert. denied*, 479 U.S. 873, 107 S.Ct. 38, 93 L.Ed.2d 174 (1986) ..... 14

*Hunt v. State*, 321 Md. 387, 583 A.2d 218 (1990), *cert. denied*, 502 U.S. 835, 112 S.Ct. 117, 116 L.Ed.2d 86 (1991) ..... 12

*Lambrix v. Singletary*, 520 U.S. 518 (1997) ..... 9

*Mills v. Maryland*, 486 U.S. 367 (1988) ..... 2

*Penry v. Lynaugh*, 492 U.S. 302 (1989) ..... 9

*Saffle v. Parks*, 494 U.S. 484 (1990) ..... 9, 10

*Schriro v. Summerlin*, 124 S. Ct. 2519 (2004) ..... 10

*State v. Evans*, Misc. No. 8, Sept. Term, 1991 (order filed June 4, 1991) ..... 2, 3

*Teague v. Lane*, 489 U.S. 288 (1989) ..... 9, 10

*Tichnell v. State*, 287 Md. 695, 415 A.2d 830 (1980) .... 14

Page

*Tyler v. Cain*, 533 U.S. 656 (2001) ..... 10

*United States v. Mest*, 789 F.2d 1069 (4th Cir.1986), *cert. denied*, 479 U.S. 846, 107 S.Ct. 163, 93 L.Ed.2d 102 (1986) ..... 13, 14, 17

*Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) ..... 15

**Statutes:**

18 U.S.C. § 241 ..... 5

18 U.S.C. § 1512 ..... 5

28 U.S.C. § 1257(a) ..... 1

**Maryland Annotated Code:**

Article 27, § 413 ..... 11, *passim*

Criminal Law Article, § 2-303 ..... 11

**Rule:**

Rule 60 ..... 4

**Miscellaneous:**

1983 Md. Laws, Ch. 296 ..... 11, *passim*

L. Tribe, *American Constitutional Law*, § 10-3 (2d ed. 1988) ..... 15, 16

## BRIEF IN OPPOSITION

Respondent, the State of Maryland, respectfully requests that this Court deny the Petition for Writ of Certiorari of Petitioner, Vernon Lee Evans, Jr. Evans is under sentence of death in Maryland, having been convicted in the Circuit Court for Worcester County, Maryland, in 1984, of first degree murder and other crimes.

## OPINIONS BELOW

The opinion of the Court of Appeals of Maryland, *Evans v. State*, 382 Md. 248, 855 A.2d 291 (2004), is reproduced in the appendix to Evans's petition. (App. 1a-38a). The unpublished memorandum opinion and order of the Circuit Court for Baltimore County denying relief is likewise reproduced in the appendix to Evans's petition. (App. 41a-46a).

## JURISDICTION

Evans has invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a). (Pet. for Cert. at 1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional and statutory provisions on which Evans relies are reproduced in the appendix to the Petition for Certiorari. (App. 47a-53a)

## STATEMENT OF THE CASE

A. Procedural history

By an indictment presented in the Circuit Court for Baltimore County, Maryland, on June 30, 1983, the State of Maryland ("State") charged Evans with first degree murder of

David Scott Piechowicz, first degree murder of Susan Kennedy, and other offenses. *Evans v. State*, 304 Md. 487, 495, 499 A.2d 1261, 1265 (1985) (*Evans II*). The State notified Evans of its intention to seek the death penalty. *Id.* Pursuant to Evans's exercise of his automatic right of removal, the case was transferred to the Circuit Court for Worcester County, Maryland. *Id.* That court denied Evans's pretrial motion to dismiss under the Double Jeopardy Clause, and in Evans's ensuing interlocutory appeal the Maryland Court of Appeals affirmed. *Evans v. State*, 301 Md. 45, 58, 481 A.2d 1135, 1141 (1984), *cert. denied sub nom. Grandison v. Maryland*, 470 U.S. 1034 (1985) (*Evans I*).

A jury subsequently convicted Evans on both first degree murder counts and other charges. *Evans II*, 304 Md. at 494, 499 A.2d at 1264. In the ensuing capital sentencing hearing the same jury imposed two sentences of death. *Id.* On direct appeal, the Maryland Court of Appeals affirmed the convictions and sentences. *Id.* at 539, 499 A.2d at 1288. The court also denied Evans's subsequent motion for reconsideration. *Foster, Evans, and Huffington v. State*, 305 Md. 306, 319, 503 A.2d 1326, 1333 (1986) (*Evans III*). This Court denied certiorari on June 30, 1986. *Evans v. Maryland*, 478 U.S. 1010 (1986) (order).

On March 28, 1991, the Circuit Court for Worcester County partially granted Evans's petition for post conviction relief by vacating Evans's death sentences pursuant to *Mills v. Maryland*, 486 U.S. 367, 384 (1988), but denied relief as to Evans's guilt/innocence convictions. The Maryland Court of Appeals denied the State's application for leave to appeal and Evans's cross-application. *State v. Evans*, Misc. No. 8, Sept. Term, 1991 (order filed June 4, 1991).

Evans, in connection with the re-sentencing, filed a suggestion for removal and the case was returned to the Circuit Court for Baltimore County. *Evans v. State*, 333 Md. 660, 666, 637 A.2d 117, 120 (1994) (*Evans IV*). A jury in a capital re-

sentencing hearing in that court returned two death sentences. *Id.* On direct appeal, the Maryland Court of Appeals affirmed. *Id.* at 699, 637 A.2d at 136. This Court denied certiorari on October 3, 1994. *Evans v. Maryland*, 513 U.S. 833 (1994) (order).

On August 29, 1995, Evans filed in the Circuit Court for Baltimore County another petition for post conviction relief. After an evidentiary hearing, the court denied the petition in its entirety by a decision dated January 24, 1997. The Maryland Court of Appeals denied Evans's application for leave to appeal from the denial of post conviction relief on May 7, 1997. *Evans v. State*, 345 Md. 524, 693 A.2d 780, *cert. denied*, 522 U.S. 966 (1997).

Evans filed a federal habeas petition on November 3, 1997, 180 days after the state appellate court's final order. On April 12, 1999, Evans filed a motion for stay of the federal habeas proceeding, asking the district court to hold his petition in abeyance while he returned to state court to litigate an alleged *Brady v. Maryland*, 373 U.S. 83 (1963), violation, and then permit him to amend the petition if unsuccessful in state court. The district court denied the motion, finding that allowing Evans a stay and then leave to amend his petition would circumvent the intent of the habeas statute. The district court then denied Evans's petition on June 30, 1999, *Evans v. Smith*, 54 F. Supp.2d 503 (D. Md. 1999), and a motion to alter or amend judgment.

On August 25, 1999, Evans filed in the Circuit Court for Baltimore County a motion to re-open his post conviction proceedings based on the alleged *Brady* violation. The Circuit Court for Baltimore County denied the motion without a hearing on October 20, 1999. Evans's application for leave to appeal that denial was denied by the Court of Appeals of Maryland on December 16, 1999. *Evans v. State*, Misc. No. 18, Sept. Term, 1999 (order). On February 1, 2000, Evans filed another petition for writ of habeas corpus in federal district

court raising the *Brady* claim. Simultaneously, he filed a motion in the Fourth Circuit for authorization to file a second or successive petition. Before either court ruled on his filings, Evans filed another motion with the district court on February 3, 2000, asking that the February 1 habeas filing be treated as a Rule 60(b) motion. On February 16, 2000, the Fourth Circuit denied Evans authorization to file a second or successive petition and his motion to stay.

On July 17, 2000, the Fourth Circuit affirmed the district court's denial of Evans's federal habeas petition and affirmed the district court's denial of a stay. *Evans v. Smith*, 220 F.3d 306, 325 (4th Cir. 2000). Evans filed a petition for writ of certiorari with this Court on December 12, 2000, which was denied on March 19, 2001. *Evans v. Smith*, 532 U.S. 925 (2001) (order).

On April 2, 2001, Evans filed another motion to re-open post conviction proceedings and a motion for stay in the Circuit Court for Baltimore County. The motion to re-open post conviction was based on claims that the indictment was fatally defective under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and that his death sentence was based on racial bias. Those motions were denied on October 12, 2001. The Court of Appeals of Maryland denied Evans's application for leave to appeal those rulings on December 14, 2001. *Evans v. State*, Misc. No. 10, Sept. Term, 2001 (order).

On May 8, 2000, during the pendency of his appeal in the Fourth Circuit, Evans filed a motion for new trial and a motion to correct an illegal sentence in the Circuit Court for Baltimore County. Hearings were held on April 18 and December 3, 2002. The trial court denied the motions on July 18, 2003. (App. 41a-46a). On July 23, 2004, the Court of Appeals of Maryland affirmed the rulings of the lower court. *Evans v. State*, 382 Md. 248, 855 A.2d 291 (2004). (App. 1a-38a). On September 10, 2004 the Court of Appeals of Maryland denied Evans's motion for reconsideration. (App. 1a).

B. Statement of Facts

On direct appeal from Evans's guilt/innocence trial, the Court of Appeals of Maryland summarized the salient facts of Evans's offenses as follows:

> The basic facts of the case are as follows. According to the State's evidence, the defendant Evans and Anthony Grandison entered into an agreement whereby Evans would kill David Scott Piechowicz and his wife, Cheryl, because the couple were scheduled to testify against Grandison in a narcotics case pending in the United States District Court for the District of Maryland. Evans was to receive $9,000.00 from Grandison for performing the murders.
>
> David Scott Piechowicz and Cheryl Piechowicz were employed at the Warren House Motel in Baltimore County. On April 28, 1983, Susan Kennedy, the sister of Cheryl Piechowicz, was working in place of Cheryl at the Warren House Motel. The evidence was sufficient to prove beyond a reasonable doubt that, on April 28th, Evans went to the motel and, not knowing the Piechowiczes, shot David Scott Piechowicz and Susan Kennedy with a MAC-11 machine pistol. Nineteen bullets were fired at the victims, who died from the multiple gunshot wounds.
>
> A two count indictment was filed against Evans and Grandison in the United States District Court. They were charged with violating the Piechowicz's civil rights by interfering with their right to be witnesses in a judicial proceeding, in violation of 18 U.S.C. § 241, and with witness tampering, in violation of 18 U.S.C. § 1512.
>
> Subsequently the present case began with a four count indictment in the Circuit Court for Baltimore County, charging Evans and Grandison each with two

> counts of first degree murder, one count of conspiracy to commit murder, and use of a handgun in the commission of a felony or crime of violence. Upon the defendants' requests for removal, Grandison's trial was transferred to the Circuit Court for Somerset County and Evans's trial was transferred to the Circuit Court for Worcester County.
>
> Prior to the trial in the instant case, Evans was convicted on the federal charges and sentenced to life plus ten years imprisonment. He then filed a pretrial motion to dismiss the charges in this case on double jeopardy grounds. The motion was denied by the trial judge, and this Court affirmed. *Evans v. State*, 301 Md. 45, 481 A.2d 1135 (1984), *cert. denied*, 470 U.S. 1034, 105 S. Ct. 1411, 84 L.Ed.2d 795 (1985).

*Evans II*, 304 Md. at 494-96, 499 A.2d at 1264-65.

The United States Court of Appeals for the Fourth Circuit reviewed the evidence presented at Evans's trial as follows:

> During the state trial, the prosecution offered overwhelming incriminating evidence against Evans through a number of witnesses. The most damaging testimony came from Charlene Sparrow, who was Evans' girlfriend at the time of the murders. Sparrow testified that she accompanied Evans and Janet Moore to the Baltimore City Jail two days before the shooting. At the jail, Evans and Moore met with Grandison, who was awaiting his federal drug trial. Sparrow then inspected the reception desk area of the Warren House Motel. She reported to Evans concerning the people working there and the presence or absence of security features. Sparrow also obtained a room at the motel with Evans' funds at his request. On the day of the murders, Evans told Sparrow to wait for him in the car behind the motel. Just before Evans walked to the motel, Sparrow looked inside the brown canvas bag he

was carrying and saw a machine gun. Some ten to fifteen minutes later, Evans returned to the car, gave the smoking MAC-11 machine gun to Sparrow, and asked her to wipe it down. Evans had also told her that he would receive $9,000 "if he knocked both of them off." Evans and Sparrow went to the mall that night to spend part of the proceeds from the murders.

Other witnesses also supplied incriminating testimony as to Evans' central role in the murders. For example, Moore testified as to her and Evans' visit to Grandison at the jail two days before the killings. Calvin Harper testified concerning the day of the murder and the two days leading up to it. Harper's testimony included a description of Evans' acquisition of the machine pistol used in the crime from Rodney Kelly and Evans' statement that he liked the gun. Several other witnesses were able to place Evans in the motel lobby during the time immediately preceding the murders. For example, Etta Horne, who worked at the motel, identified Evans as the man she saw sitting in the motel lobby shortly before the murders. Helen Kondilidis, who had entered the motel shortly before the murders, also identified Evans as the man she saw sitting in the lobby.

220 F.3d at 310.[1]

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[1] Evans refers in his petition to what he claimed in his most recent state appeal was newly discovered evidence that showed that he was not the shooter. Pet. at 8 n.5. The Court of Appeals of Maryland considered each piece of evidence offered by Evans and concluded as follows:

> Evans's present argument is based upon a farfetched theory unsupported by any evidence. It rests entirely upon the well-known fact that eyewitness

## REASONS FOR DENYING THE WRIT

### I.

### THE COURT OF APPEALS OF MARYLAND CORRECTLY CONCLUDED THAT THERE WAS NO *EX POST FACTO* VIOLATION IN EVANS'S CAPITAL SENTENCING PROCEEDING.

Evans claims that the jury instruction given at sentencing and re-sentencing, which reflected a change in Maryland's death penalty statute, violated the prohibition against *ex post facto* laws. Pet. at 9-10. Specifically, he argues that, when the Maryland legislature removed intoxication from the list of statutory mitigating factors in 1983, after the crimes were committed in his case, it unfairly increased his burden of proof. *Id.* Although the Court of Appeals of Maryland rejected reasoning identical to that of Evans in *Booth v. State*, 327 Md. 142, 608 A.2d 162, *cert. denied*, 506 U.S. 988 (1992), Evans maintains that, in light of this Court's decision in *Carmell v. Texas*, 529 U.S. 513 (2000), the earlier holding of the state court in *Booth* is no longer good law. Pet. at 9-10. The Court of Appeals of Maryland properly rejected this claim.[2]

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> descriptions of an individual or estimates of time will likely vary. In our view, there is virtually no possibility that any jury would find that Evans was involved in the murders only as a principal in the second degree. The evidence that Evans was the "triggerman" is overwhelming.

382 Md. at 264-72, 855 A.2d at 300-05.

[2] Although the State argued that Evans's sentence was not inherently illegal under Maryland law and, further, that Evans had waived any *ex post facto* claim by failing to raise it before

1. *Carmell v. Texas* Is Not Retroactive.

Relying on this Court's opinion in *Carmell*, Evans asserts that that case makes the Maryland court's holding in *Booth* erroneous. However, in order to prevail on such a theory, Evans must first establish that the holding in *Carmell* is retroactive.[3] This he cannot do.

*Carmell* is not retroactive under federal law. Under this Court's doctrine of nonretroactivity, "'new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced,'" *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997) (quoting *Teague v. Lane*, 489 U.S. 288, 310-11 (1989)), unless "the relief sought falls within one of two narrow exceptions to nonretroactivity." *Id.*

> The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe, *see Teague,* [489 U.S. at 311], or addresses a 'substantive categorical guarante[e] accorded by the Constitution,' such as a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Saffle v. Parks*, [494 U.S. 484, 494 (1990)](quoting *Penry v. Lynaugh,* [492 U.S. 302, 329 (1989)]. . . .
>
> The second exception is for "'watershed rules of criminal procedure' implicating the fundamental

---

now on direct or collateral review in state or federal court, the Court of Appeals, nonetheless, chose to review the claim on its merits. 382 Md. at 278-80, 855 A.2d at 309-10.

[3] The Court of Appeals of Maryland did not address the issue of retroactivity under either federal or state law, although the State raised that issue in its brief.

> fairness and accuracy of the criminal proceeding. *Ibid.* (quoting *Teague*, [489 U.S. at 311.

520 U.S. at 539-40. *Accord Beard v. Banks*, 124 S. Ct. 2504, 2513 (2004).

Evans's conviction was final well before the decision in *Carmell*. This Court's decision in *Tyler v. Cain*, 533 U.S. 656 (2001), resoundingly dismisses any claim that *Carmell* is retroactive in the context of Evans's jury instruction complaint. With respect to the second exception, which is the only one Evans could conceivably rely on, the Court in *Tyler v. Cain* explained why the rule of *Cage v. Louisiana*, 498 U.S. 39 (1990)(per curiam), regarding a reasonable doubt instruction, was not retroactive:

> [T]he second *Teague* exception is reserved only for truly "watershed" rules. *See O'Dell, supra*, at 167; *see also Caspari v. Bohlen*, 510 U.S. 383, 396 (1994)(describing such rules as "groundbreaking"); *Graham v. Collins*, 506 U.S. 461, 478 (1993)(explaining that the exception is limited to "a small core of rules," which not only seriously enhance accuracy but also "requir[e] 'observance of those procedures that . . . are implicit in the concept of ordered liberty'")(*quoting Teague, supra,* at 311 (internal quotation marks omitted)); *Saffle v. Parks*, 494 U.S. 484, 495 (1990)(focusing on "primacy and centrality" of the rule). *As we have recognized, it is unlikely that any of these watershed rules "ha[s] yet to emerge."*

533 U.S. at 666 n.7 (emphasis added)(citation omitted). *Accord Schriro v. Summerlin*, 124 S. Ct. 2519, 2523 (2004). *See also Banks* ("it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception").

This Court has not said that *Carmell* is retroactive and, given its more recent retroactivity analysis, there is no reasoned basis to believe that the Court would ever do so.

2. There Has Been No *Ex Post Facto* Violation.

Even if Evans could surmount the retroactivity hurdle necessary to place the *ex post facto* claim before this Court, the claim would fail on the merits. When the murders took place on April 28, 1983, Maryland's death penalty statute listed seven specific mitigating circumstances, including:

> The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, emotional disturbance, or intoxication.

Md. Code Ann., Art. 27, § 413(g)(4)(1982 Repl. Vol.).[4] Then, as now, Maryland's statutory death penalty scheme also allowed the sentencer to consider "[a]ny other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case." *Id.*, § 413(g)(8). Approximately one month after the murders, Maryland's governor signed an act, the effective date of which was July 1, 1983, that amended Article 27, Section 413(g)(4) to eliminate intoxication as a statutorily enumerated mitigating circumstance. 1983 Md. Laws, Ch. 296.

On direct appeal from his third death sentence, another Maryland capital litigant, John Booth-El, complained that the 1983 change, whereby intoxication was eliminated as a specific statutory mitigating circumstance, violated the federal and state constitutional prohibitions against *ex post facto* laws. In response to Booth-El's complaint, the Court of Appeals of Maryland described the effect of this change in law as follows:

> Prior to the 1983 enactment the burden was on the

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[4] That provision is now found in the Criminal Law Article, Section 2-303(h)(2)(iv). The State will cite to the codification as it existed at the time of Evans's sentencing proceedings.

> murderer to prove by a preponderance of the evidence diminished capacity as a result of intoxication. If the jury found that fact, then the statute determined that that circumstance was mitigating and that it was to be considered in weighing whether the aggravating circumstance outweighed intoxication and any other mitigating circumstances. After the change, the murderer has the burden of proving by a preponderance of the evidence both the fact of diminished capacity due to intoxication and that that fact is a mitigating circumstance. *See Hunt v. State*, 321 Md. 387, 437, 583 A.2d 218, 242 (1990), *cert. denied*, 502 U.S. 835, 112 S.Ct. 117, 116 L.Ed.2d 86 (1991); *Foster v. State*, 304 Md. 439, 482, 499 A.2d 1236, 1258 (1985), *cert. denied*, 478 U.S. 1010, 106 S.Ct. 3310, 92 L.Ed.2d 723 (1986). Both before and after the 1983 amendment, the amount of weight to be given to intoxication as a mitigating circumstance turned on the judgment of each individual juror.

327 Md. at 169, 608 A.2d at 175 (footnote omitted). The *Booth* court went on to hold as follows:

> The prohibition against *ex post facto* laws is defined by three historic categories. *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 2721, 111 L.Ed.2d 30 (1990).
>
> > "[A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*."
>
> *Id.* at ----, 110 S.Ct. at 2719 (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S.Ct. 68, 68, 70 L.Ed. 216 (1925)). The change to § 413 did not deprive Booth of

> any defense to the crime of murder that was available at the time of the murder. The change, which involves only procedures at the sentencing phase of trial, does not fit in either of the other *ex post facto* categories.
>
> Changes in trial or appellate procedure that had consequences far more disadvantageous to the defendant than the change to Maryland's § 413 have been held not to offend the *ex post facto* clause. *See Collins*; *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); *Evans v. Thompson*, 881 F.2d 117 (4th Cir.1989), *cert. denied*, 497 U.S. 1010, 110 S.Ct. 3255, 111 L.Ed.2d 764 (1990); *United States v. Mest*, 789 F.2d 1069 (4th Cir.1986), *cert. denied*, 479 U.S. 846, 107 S.Ct. 163, 93 L.Ed.2d 102 (1986).

327 Md. at 170-71, 608 A.2d at 175-76. After relating the circumstances in each of these cited cases, the Court stated as follows:

> Following the change in the Maryland statute the defendant continues to have the burden of producing evidence on intoxication and of persuading as many jurors as possible to find as a fact that the defendant was intoxicated. The change affects only the procedure for determining whether the fact, if found, is mitigating. It is absolutely clear that amended § 413 does not remove intoxication as a potential mitigating circumstance in death penalty proceedings. The preamble to the amending act declares:
>
> > "The General Assembly is aware that the Supreme Court has held that evidence of the intoxication of a defendant in a case involving the death penalty must be allowed and considered as a factor in mitigation. The General Assembly further believes that such mitigating factor should be considered under the eighth mitigating factor and not highlighted

> specifically so as to appear more as justification than as one of the many factors that may be considered as possible mitigation. In striking the word intoxication from the fourth mitigating factor, the General Assembly is not eliminating the consideration of intoxication but altering the emphasis presently indicated...."

Chapter 296 of the Acts of 1983.[11]

* * *

The amendment to § 413 did not change the fact that first-degree murder during commission of a robbery was punishable by death, a fact of which pre- existing Maryland law gave Booth clear notice. *See Dobbert*, 432 U.S. at 297-98, 97 S.Ct. at 2300 (death penalty law in effect at time of murders and later found unconstitutional nevertheless "clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose"); *Grandison v. State*, 305 Md. 685, 754, 506 A.2d 580, 614 (change specifying impact statements from families of murder victims to be used in capital sentencing did not change the "quantum of punishment attached to the crime"), *cert. denied*, 479 U.S. 873, 107 S.Ct. 38, 93 L.Ed.2d 174 (1986); *Booth II*, 306 Md. at 222, 507 A.2d at 1123-24 (same); *Tichnell v. State*, 287 Md. 695, 737, 415 A.2d 830, 852 (1980) (even if Maryland statute were unconstitutional before addition of catch-all mitigation instruction, statute gave defendant "fair warning as to the degree of culpability which Maryland ascribes to the act of murder"); *Evans*, 881 F.2d at 120. The amendment did not remove any factors from the jury's consideration in finding mitigation; nor did it make inadmissible any previously admissible evidence. *See United States v. Mest*, 789 F.2d at 1071-72; *see also Collins*, 110 S.Ct. at 2719 n.

3.

None of the purposes of the prohibition against *ex post facto* laws would be served by applying the prohibition here. In *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), the Supreme Court, in a case involving punishment additional to that prescribed at the time of the offense, identified two principal protections the clause affords. First, "the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." 450 U.S. at 28-29, 101 S.Ct. at 964. As we have already pointed out, § 413 gave fair warning that first-degree murder in the commission of a robbery was potentially punishable by death. To paraphrase Professor Tribe in his discussion of *Dobbert*, "[Booth's] reliance interest [on the benefits of being intoxicated while he murdered] hardly deserves mention, let alone respect." *See* L. Tribe, *American Constitutional Law* § 10-3, at 640 (2d ed. 1988).

Second, "[t]he ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation." 450 U.S. at 29, 101 S.Ct. at 964. Even murderers "are entitled to something better than a legislative lynching." L. Tribe, *supra*, at 640. But in this case, as in *Dobbert*, there was no actual risk of legislative abuse. House Bill 62, which later became Chapter 296 of the Acts of 1983, was pre-filed in the 1983 legislative session. The bill was introduced in the House of Delegates on January 12, 1983. It passed the House on March 23 and in the Senate on April 6, 1983. The Attorney General approved the bill for constitutionality and legal sufficiency on May 11, 1983. The Bronsteins were murdered on May 18. The only action taken on the bill after the murders was its signing

by the Governor. Plainly the Legislature could not have, and did not, contemplate John Booth when it deleted intoxication as an express mitigating circumstance on the sentencing form. *See also* L. Tribe, *supra*, at 640 n. 26 (speculating that legislation adding an aggravating circumstance in response to the events of a particular murder still might not violate the *ex post facto* ban if the amendment were drawn "in terms broad enough to encompass not just the particular individual who is ultimately convicted of the specific killing at issue but anyone else who meets similar criteria").

* * *

For all these reasons, the changes to § 413 do not violate *ex post facto* prohibitions.

---

[11] The Legislature may have desired to avoid giving the appearance of equating voluntary intoxication with involuntary mental illness.

327 Md. at 172-76, 608 A.2d at 177-78.

Booth-El raised the claim of an *ex post facto* violation in his federal habeas petition. While the federal district court found that there had been an *ex post facto* violation, based on the 2000 decision in *Carmell*, the Fourth Circuit reversed that ruling, finding that under the case law existing in 1992 when the Maryland court decided Booth-El's appeal, that decision was a reasonable application of clearly established federal law. *Booth-El v. Nuth*, 288 F.3d 571, 577-78 (4th Cir.), *cert. denied*, 537 U.S. 959 (2002). However, the Fourth Circuit further held that the change in Maryland's death penalty statute was purely procedural. *Id.* at 578-79. It did not remove intoxication as a possible mitigator or remove any mitigating factors from the jury's consideration. *Id.* at 579. As a procedural change, the panel found it far less disadvantageous to a defendant than others which have been found not to violate the Ex Post Facto

Clause, citing to *Collins*, *Dobbert*, and decisions of the Fourth Circuit in *Evans* and *Mest*. *Id*. at 579-80. Booth-El's petition for writ of certiorari to this Court, raising *inter alia* the *ex post facto* claim, was subsequently denied. *Booth v. Maryland*, 506 U.S. 988 (1992).

In Evans's most recent appeal, the Court of Appeals of Maryland reviewed its reasoning in *Booth* and found that it was entirely consistent with this Court's *Carmell* decision. 382 Md. at 281-85, 855 A.2d at 310-13.

> In our view, *Carmell v. Texas* neither overrules *Booth v. State*, *supra*, 327 Md. at 168-176, 608 A.2d at 174-178, nor renders the fourth category of *Calder v. Bull* applicable to Ch. 296 of the Acts of 1983. The fourth category of *Calder v. Bull* and the holding of *Carmell* relate to changes in rules of *evidence* to facilitate a *conviction*. Such changes lessen the prosecution's burden of proof. As discussed in Part III A of this opinion, the change brought about by Ch. 296 did not affect the *evidence* to establish the existence of a mitigating circumstance, did not affect the *weight* to be given a mitigating circumstance, and did not alter the evidentiary burden of proof to establish any *fact*. As earlier pointed out, Ch. 296 changed nothing with regard to the existence of or weight to be given a mitigating circumstance.
>
> The only modification brought about by Ch. 296 concerned a *judgment* as to whether a particular circumstance should be regarded as mitigating. Instead of the Legislature indicating its judgment that intoxication should be deemed mitigating, Ch. 296 provided that each juror should make that judgment. In the final analysis, however, there was no significant change regarding that judgment. Both before and after the enactment of Ch. 296, the judgment as to how much *weight* should be given the factor of intoxication

> belonged to the jurors.
>
> Ch. 296 of the Acts of 1983 was not a "law that alters the *legal* rules of evidence, and receives less . . . testimony, than the law required at the time of the commission of the offense, *in order to* [decide against] *the offender*." *Calder v. Bull*, 3 Dall. at 390, 1 L.Ed. at 650. Consequently, the application of Ch. 296 to Evans's 1992 sentencing hearing did not violate the *ex post facto* prohibition.

382 Md. at 285, 855 A.2d at 312-13 (emphasis in original).

Thus, even if one were willing to overlook the fact that Evans's death sentence is not illegal, that he has waived the claim by not raising it earlier, and that *Carmell* is not retroactive, Evans still would not prevail, because the change in Maryland's death penalty statute does not fit even within the fourth *Calder* factor. It was procedural only and changed no rule of evidence to Evans's detriment. Under either statute, Evans ultimately had to present evidence of intoxication sufficient to convince the jury that such intoxication mitigated against imposition of the death penalty. Finally, the jury at Evans's re-sentencing did consider his drug use, citing it as a mitigating factor. Thus the jurors who so found were required to weigh it into their decision to impose the death penalty.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for writ of certiorari filed herein be denied.

Respectfully submitted,

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No. 04-818

IN THE

# Supreme Court of the United States

VERNON EVANS, JR.,
*Petitioner,*

*v.*

STATE OF MARYLAND,
*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND**

## REPLY BRIEF FOR PETITIONER

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## CAPITAL CASE

## QUESTION PRESENTED

Whether the *Ex Post Facto* Clause of the Constitution prohibits sentencing a person to death under a statute that was enacted after the charged offense took place and that lowers the State's burden of proof at sentencing, and increases the defendant's.

## TABLE OF CONTENTS


Page

CAPITAL CASE—QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iv

REPLY BRIEF FOR PETITIONER ..... 1

I. *TEAGUE* DOES NOT BAR THIS COURT'S REVIEW. ..... 2

II. EVANS'S SENTENCING UNDER THE NEW DEATH-PENALTY STATUTE VIOLATED THE *EX POST FACTO* CLAUSE. ..... 5

CONCLUSION ..... 8

## TABLE OF AUTHORITIES

### CASES

Page(s)

*Beard* v. *Banks*, 124 S. Ct. 2504 (2004) ..... 2
*Booth* v. *State*, 608 A.2d 162 (Md. 1992) ..... 1, 5, 6
*Booth-El* v. *Nuth*, 140 F. Supp. 2d 495 (D. Md. 2001) ..... 3
*Booth-El* v. *Nuth*, 288 F.3d 571 (4th Cir. 2002) ..... 4
*Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798) ..... 3, 4
*Carmell* v. *Texas*, 529 U.S. 513 (2000) ..... 1, 2, 4, 6, 7
*Caspari* v. *Bohlen*, 510 U.S. 383 (1994) ..... 2
*Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821) ..... 2
*Collins* v. *Youngblood*, 497 U.S. 37 (1990) ..... 3, 6
*Dobbert* v. *Florida*, 432 U.S. 282 (1977) ..... 4
*Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) ..... 2
*Parke* v. *Raley*, 506 U.S. 20 (1992) ..... 3
*Schriro* v. *Summerlin*, 124 S. Ct. 2519 (2004) ..... 4
*Sprietsma* v. *Mercury Marine*, 537 U.S. 51 (2002) ..... 2
*Taylor* v. *Freeland & Kronz*, 503 U.S. 638 (1992) ..... 2
*Teague* v. *Lane*, 489 U.S. 288 (1989) ..... 1, 2, 3
*Yee* v. *City of Escondido*, 503 U.S. 519 (1992) ..... 3

### RULES

S. Ct. R. 10 ..... 2

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STATE OF MARYLAND,
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**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND**

## REPLY BRIEF FOR PETITIONER

The State's brief in opposition fails to come to terms with Evans's argument that his sentencing to death under the wrong statute violated the *Ex Post Facto* Clause and flouted this Court's decision in *Carmell* v. *Texas*, 529 U.S. 513 (2000). Instead of squarely addressing *Carmell*, the State resorts to an inapplicable defense under *Teague* v. *Lane*, 489 U.S. 288 (1989), and then, when it does address the merits, offers only successive pages of block quotations from a pre-*Carmell* case, *Booth* v. *State*, 608 A.2d 162 (Md. 1992), which, as we explained in the Petition, is irrelevant and wrongly decided because it mistakenly failed to consider the fourth category of *ex post facto* laws. The State's inability to provide any further support for the decision below only underscores that the Maryland Court of Appeals defied this Court's decision in *Carmell* and that plenary review—and perhaps even summary reversal—by this Court is warranted.

## I. *TEAGUE* DOES NOT BAR THIS COURT'S REVIEW.

The State incorrectly argues that, in order for Evans to prevail on his *ex post facto* claim, he must establish that *Carmell* v. *Texas*, 529 U.S. 513 (2000), has retroactive effect under *Teague* v. *Lane*, 489 U.S. 288 (1989). *Teague*, however, does not apply to this case because it applies only to federal habeas review, not direct appellate review of a state court decision. *See Beard* v. *Banks*, 124 S. Ct. 2504, 2511 (2004) ("*Teague*'s nonretroactivity principle acts as a limitation on the power of federal courts to grant 'habeas corpus relief to . . . state prisoner[s].'"); *Caspari* v. *Bohlen*, 510 U.S. 383, 389 (1994) (*Teague*'s "nonretroactivity principle prevents a federal court from granting habeas corpus relief to a state prisoner based on a rule announced after his conviction and sentence became final."); *Teague*, 489 U.S. at 310 (plurality opinion of O'Connor, J.) ("[W]e now adopt Justice Harlan's view of retroactivity for cases on collateral review.").

The State boldly ignores this black-letter law and instead assumes, without reasoning, that *Teague* applies to this Court's *direct review* of the Court of Appeals of Maryland's decision. The State would have *Teague* preclude *any* review of that decision or, for that matter, of any other state post-conviction decision applying a new rule of constitutional procedure—no matter how poorly reasoned the state court's opinion and regardless of whether (as here) a state court has blatantly disregarded binding precedent of this Court. Nothing, however, in *Teague* or its progeny restricts this Court's appellate power over state court decisions. *Cf. Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 350 (1821) ("[W]herever a case is fit for judicial cognizance, or wherever the State tribunals take cognizance of it, whether properly or not, the appellate power of this Court may intervene, and protect the constitution and laws of the Union from violation."); *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-348 (1816); S. Ct. R. 10 (certiorari review appropriate where "a state court . . . has decided an important federal

question in a way that conflicts with relevant decisions of this Court.").

Furthermore, even if *Teague* applied to direct review of state court decisions, it would not be implicated in this case. As an initial matter, the State never raised *Teague* in the trial court and thus waived the point. *See Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n. 4 (2002); *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992) ("[O]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]."); *cf. Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992). Probably for this reason, the Court of Appeals did not address, let alone rely on, *Teague* in its decision upholding the sentencing of Evans under the wrong death-penalty statute. Because the State has waived any right to rely on *Teague* at this later stage, even a federal court reviewing a habeas petition would not need to apply it. *See Parke* v. *Raley*, 506 U.S. 20, 25 (1992) (reviewing case on merits where State failed raise *Teague* argument below); *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990) (holding that *Teague* rule is not jurisdictional and may be waived).

*Teague* is also inapposite because it applies only to *new* constitutional rules, and *Carmell* does not introduce a new rule. "In general, . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. *Carmell* did not announce, and Evans does not rely on, any new constitutional principle. Evans's claim, based on *Calder* v. *Bull*'s fourth category of *ex post facto* laws, is *not* based on a new rule. It is instead based on the application of a very old rule, first announced by the Supreme Court in 1798. *See Booth-El* v. *Nuth*, 140 F. Supp. 2d 495, 517 n.23 (D. Md. 2001) (rejecting argument that *Carmell*'s discussion of fourth category of *ex post facto* laws constituted new rule under *Teague*), *rev'd in part on other grounds*, 288 F.3d 571

(4th Cir. 2002).[1] Indeed, in *Carmell*, this Court stated that, since *Calder*, it "has repeatedly endorsed . . . the fourth category" of *ex post facto* laws on which Evans's claim relies. *Carmell*, 529 U.S. at 525. And the Court expressly rejected the argument that it had previously "cast out the fourth category" in *Collins*. *Id.* at 537. *Carmell* thus announced no new rule, but merely reaffirmed the validity of a 200-year-old rule.[2]

---

[1] Even the Fourth Circuit, which rejected the *ex post facto* claim in *Booth-El*, did not attempt to invoke *Teague* to support its decision. *See* 288 F.3d at 576-580.

[2] Even if *Carmell* could be construed to announce a new rule, it would fall within *Teague*'s exception for substantive rules. *See Schriro* v. *Summerlin*, 124 S. Ct. 2519, 2522-2524 & n.4 (2004). A substantive rule "narrow[s] the scope of a criminal statute" or "place[s] particular conduct or persons covered by the statute beyond the State's power to punish." *Id.* at 2522. In *Carmell*, this Court held that the application of any law that lowers the State's burden of proof violates the *Ex Post Facto* Clause because "[r]educing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end" as when "the government subverts the presumption of innocence by reducing the number of elements" of the crime. 529 U.S. at 532-533. In both instances, the State alters the very definition of the crime. *Compare Dobbert* v. *Florida*, 432 U.S. 282, 292-297 (1977) (finding no *ex post facto* violation where statute merely changed the role of judge and jury in imposition of death sentence).

If the Court were to characterize *Carmell* as a new *procedural* rule, it would fall within the second *Teague* exception because it implicates "the fundamental fairness and accuracy of the criminal proceeding." *Schriro*, 124 S. Ct. at 2524 (internal quotation omitted). In *Carmell*, the Court described laws in the fourth *Calder* category as "manifestly unjust and oppressive," 529 U.S. at 532 (quoting *Calder*, 3 U.S. (3 Dall.) at 391), and stated that the Constitution's prohibition on such laws serves "*a fundamental fairness interest*" *id.* at 532-533 (emphasis added). The use of a statute that impermissibly alters the burden of proof in favor of the State "seriously diminishe[s] accuracy" and creates an "impermissibly large risk" that, under the correct statute, a different result would have obtained and the State may end up "punishing conduct the law does not reach." *Schriro*, 124 S. Ct. at 2525 (internal quotations omitted).

## II. EVANS'S SENTENCING UNDER THE NEW DEATH-PENALTY STATUTE VIOLATED THE *EX POST FACTO* CLAUSE.

When it does reach the merits of Evans's *ex post facto* claim, the State fails to address Evans's arguments, instead relying almost exclusively on an outdated case, *Booth* v. *State*, 608 A.2d 162 (Md. 1992). Evans's core claim is that *Booth* can no longer be considered good law after this Court's decision in *Carmell*. Instead of substantively responding to that argument, however, the State simply inserts lengthy block quotations from *Booth* itself, never explaining how it can survive after *Carmell*.

The reason behind the State's omission is clear: To the extent *Booth* ever was good law, it is no longer. As explained in the Petition, *Booth* was effectively overruled by this Court's decision in *Carmell*, in which the Court explicitly clarified that there are four, not three, categories of *ex post facto* laws. Pet. 6. *Booth* is fundamentally flawed because it was expressly premised on the assumption that there were only three categories of *ex post facto* laws and that Maryland's post-July 1, 1983 death-penalty statute did not fall into any of those three categories:

> The prohibition against *ex post facto* laws is defined by *three* historic categories.... The change to the [death-penalty statute] did not deprive [the defendant] of any defense to the crime of murder that was available at the time of the murder [*i.e.*, no violation of the first *Calder* category]. The change, which involves only procedures at the sentencing phase of trial, does not fit in *either* of the other *ex post facto* categories.

*Booth*, 608 A.2d at 175 (emphases added) (citations omitted). Given that Evans's claim relies on the fourth category of *ex post facto* laws, it is baffling that the State would rely almost exclusively on *Booth*, which contained *no* discussion of that category at all.

Nor does the State's repetition of *Booth*'s argument that the change in Maryland's death-penalty law was merely "procedural" (Opp. 13, 16, 18) help the State's case. First,

the change in Maryland's statute was not procedural, if that term is understood to mean a change that may harm some defendants but that might help others. The statutory change at issue here can only harm defendants, and it never harms the State. Second, as explained in the Petition (*see* Pet. 14 n.7), any procedural/substantive distinction is not relevant to defining violations of the *Ex Post Facto* Clause. The Court noted in *Collins* that although several of this Court's cases "have described as 'procedural' those changes which . . . do not violate the *Ex Post Facto* Clause," 497 U.S. at 45, and have looked beyond the *Calder* categories to define the scope of the *Ex Post Facto* Clause based on a procedural substantive/distinction, *id.* at 45-46, "simply labeling a law 'procedural' . . . does not immunize it from scrutiny under the *Ex Post Facto* Clause," because "*the prohibition which may not be evaded is the one defined by the Calder categories*," *id.* at 46 (emphasis added). Indeed, the Court stated expressly in *Carmell* that *Collins* put to rest the procedural/substantive distinction, which the Court characterized as a "doctrinal hitch that had developed in our cases." *Carmell*, 529 U.S. at 539. The State's attempt to resurrect the distinction here is just a means to avoid the real question—whether Maryland's statutory change falls within *Calder*'s fourth category.

The State also erroneously contends, again in indiscriminate reliance on *Booth*, that the *Ex Post Facto* Clause does not apply in this case because "[n]one of the purposes of the prohibition against *ex post facto* laws would be served by applying the prohibition here." Opp. 15 (quoting *Booth*, 608 A.2d at 172-176). In particular, the State notes that the *Ex Post Facto* Clause was intended to provide notice of changes in law and prevent vindictive legislation, and that the application of the new death-penalty statute implicated neither purpose. Opp. 15-16. But as this Court made clear in *Carmell*, the *Ex Post Facto* Clause is defined by the four *Calder* categories, not by whether a statutory change implicates the purposes of the Clause. 529 U.S. at 539.

In any event, *Carmell* explains that the purposes cited by the State "are not [the Clause's] only aims." 529 U.S. at 531 n.21. In fact, "[t]he fourth [*Calder*] category . . . resonates harmoniously with one of the *principal interests* that the *Ex Post Facto* Clause was designed to serve, fundamental justice." *Id.* at 531 (emphasis added); *see also id.* at 534 ("The Framers, quite clearly, viewed [the lowering of the state's burden of proof] as grossly unfair, and adopted the *Ex Post Facto* Clause accordingly."). Indeed, *Carmell* notes "[t]here is plainly a fundamental fairness interest, *even apart from any claim of reliance or notice*, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Id.* at 533 (emphasis added).

In the last two pages of its argument (Opp. 17-18), the State finally attempts to address the applicability of the fourth *Calder* category to the new death-penalty statute. But the State's basic approach is merely to quote from the Court of Appeals of Maryland's decision below without ever confronting Evans's detailed arguments showing why that decision was wrong. *See* Pet. 14-17. The State's slipshod approach demeans the seriousness of the constitutional arguments presented and the fact that the life of Vernon Evans, Jr. hangs in the balance. The State's inability to muster anything better, however, is telling.

Finally, the State wrongly contends that there was no *ex post facto* violation because Evans suffered no "detriment." Opp. 18. According to the State, "[u]nder either statute, Evans had to present evidence of intoxication sufficient to convince the jury that such intoxication mitigated against imposition of the death penalty," and "the jury did consider his drug use, citing it as a mitigating factor." *Id.* Evans does not dispute that he was required to present evidence of intoxication under both statutes. His constitutional claim, however, is that that the new death-penalty statute required him to prove, in order for intoxication to be considered a mitigating factor, *both* (1) evidence of intoxication,

*and* (2) that the intoxication mitigated, rather than aggravated (or was neutral on), his culpability.

This change increased the burden on Evans and lowered the burden on the State, in violation of the *Ex Post Facto* Clause. The fact that the sentencing form shows that one or more jurors "did consider his drug use" (Opp. 18) does not change the fact that, in applying the new statute, *all of the jurors considered the issue of intoxication in a fundamentally different light than if they had been instructed that intoxication was necessarily, as a matter of the judgment of the Legislature, a mitigating circumstance.* Indeed, under the new statute, the jurors were permitted to disregard intoxication altogether. If the court had applied the correct statute and that had changed how just one juror balanced the aggravating and mitigating factors, Evans's life would have been spared.

## CONCLUSION

The State's brief in opposition fails to offer any meaningful defense of the decision below. The petition for writ of certiorari should be granted and, as suggested in the Petition, the Court may wish to consider summary reversal, either to remand for a new sentencing or to modify Evans's sentence to life imprisonment.

Respectfully submitted,

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